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PRESENT STATUS OF THE PHILOSOPHY OF LAW AND OF RIGHTS

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THE PHILOSOPHY OF LAW
AND OF RIGHTS

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TO

ROSCOE POUND

PREFACE

FOR those who have only to obey, law is what the sovereign commands. For the sovereign, in the throes of deciding what he ought to command, this view of law is singularly empty of light and leading. In the dispersed sovereignty of modern states, and especially in times of rapid social change, law must look to the future as well as to history and precedent, and to what is possible and right as well as to what is actual. It could make good use of a philosophy if there were a philosophy it could use.

The philosophy of natural right, which Locke and his successors made current in America as well as in England, has done us much good service, and not a little bad service: it can no longer be taken as a guide. The metaphysical jurists of Europe have contributed to our store: in the works of their recent renewers, now largely available in translation, they still have much to offer. What is true remains true: a great thinker is never out of date, and never an alien. But we must think our own thoughts and build on our own foundations,—such foundations as are already rising. There is a task of interpretation to be done to bring the work of the jurist-philosophers of other lands and times into usable relations with the work of our own jurist-philosophers and with our own problems.

In this work of interpretation, the reflections of a student of philosophy who is not a jurist may serve in a modest capacity if those learned in the law will

meet them half way. I count it no small advantage in this effort to have been associated with Dean Roscoe Pound in seminaries given in the Department of Philosophy at Harvard in the years 1920-21 and 1925-26. The second seminary was to me distinctly interesting as an educational experiment. Both of us were present at most of the sessions; and in the two half-years we alternated in presenting theses or problems and in offering comment and debate. I believe the students profited, as I certainly did, by the direct give-and-take of these conversations and by the cross-fertilizing of different methods and approaches in minds disposed to meet. Dean Pound is not to be charged with any of the crudities of the present essay, nor with its theoretical trend, but I trust he will accept this acknowledgment of my great obligation to him.

This small book is intended to play a part in a larger scheme. There is now in press a work on Man and the State,—a general philosophy and psychology of political life. A philosophy of the state is incomplete without some indication of a philosophy of law. The present essay sketches the outline of what I consider the guiding principles in this field. I hope later to develop this theory in a volume on rights,—the rights of men and of nations,—and in that fuller study to profit by the criticisms of this one.

WILLIAM ERNEST HOCKING

Cambridge, Massachusetts
May 20, 1926.

CONTENTS

I. Orientation.

1. What Is behind Us? 1
2. Stammler's Standard 12
3. Kohler's Standard 24
4. The Real Issue 37

II. Propositions.

5. Justice and Social Utility . . . 47
6. Presumptive Rights 58
7. Natural Right 68
8. Specific Guides for Law-Makers . 85

PRESENT STATUS OF THE PHILOSOPHY OF LAW AND RIGHTS

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WHAT IS BEHIND US?

WHEN law was held to come direct from the gods, it required a bold man and a prophet to propose a change in it. Perhaps it is still true that a law-maker ought to be something of a prophet. But if so, we are committed in western lands to the belief that prophetic capacity is widespread: the making of law goes on everywhere merrily and apace.

In the midst of this vast labor it becomes clear to us that the more we relieve the gods of their burdens, the more we need to know what the gods know,—the general principles on which law should be made. And if this knowledge were universal, and were applied in good faith, the law-makers themselves would in turn be relieved! In either case, then, we are bound to keep trying for a systematic grasp of those principles of law which we now possess in vague and fragmentary fashion.

To make such an effort with the least waste of energy, we do well to stand on the shoulders of men who have discarded what we judge to be behind us, and who mark the issues of present and future. We choose for this purpose the two leading figures in recent German philosophy of law, Josef Kohler (d. 1919 as professor at Berlin) and Rudolf Stammler

who succeeded him. These men have surprisingly little to say of each other—Kohler dismissing Stammler with a brief reference at the opening of his *Lehrbuch der Rechtsphilosophie* (1909), while Stammler deals with Kohler chiefly through the medium of Hegel.[1] The work of comparison is left to others.

Yet these are men whom the history of legal theory will inevitably group together as so much alike in the main impulse of their thinking that these words from the preface of Kohler's *Lehrbuch* might equally well have stood in a preface to any of Stammler's philosophical writings:

> That a pure historicalness boots nothing, that the simple cleaving to the practical debases our juristic thinking, that mere construction of positive law does not suffice,—all this has become very plain.[2]

For both have a powerful metaphysical bent; both are persuaded that the end of law is so bound up with the rest of man's mental and moral universe that to get a fair view of the part, one has no choice but to consider the whole; both are reacting, therefore, less

[1] As in *Wirtschaft und Recht,* to point out the artificialities of dialectic triads as applied to history, a point in which he and Kohler are at one; and in *Theorie der Rechtswissenschaft,* to say that Hegel neglects the Kantian distinction of Form and Matter in history, hence confusing a genetic view with a systematic view, and so blurring the rightful distinctness of the ideal elements of history (pp. 550 f.)—an impeachment which Kohler would quite accept, because he would regard it as a merit.

[2] Albrecht's translation, p. xlviii. All quotations from the *Lehrbuch* will be understood to be from this translation.

from a previous type of legal philosophy than from a stage of legal non-philosophy; both attempt to connect their views with the older idealism of Germany; and both accordingly relegate their distinguished compatriot, von Ihering, to the sub-philosophical limbo,—Kohler with characteristic vehemence ascribing to him a "deplorable dilettantism in which only an unphilosophical mind like von Ihering's could find satisfaction."[3]

And further, both of them while repudiating the Historical School, together with its positivistic developments, agree with that school that there is no salvation in fixed Natural Rights, and that an interpretation of history in the light of philosophy is an indispensable guide for adapting law to changing stages of growth. Both are apostles of what ought-to-be in the law as distinguished from what is or has come to be; but both are convinced that there is no

[3] *Philosophy of Law,* p. 26. Stammler says of von Ihering (a) that he is right in thinking that the law must refer itself to an end, but that he has no adequate way of finding what the end is; (b) that he misjudges the idea of right, regarding it as something added to or taken on by society for the sake of some such end as security, whereas it is presupposed in the constitution of any society, and (in Kantian phraseology) makes society possible:

"Wenn Ihering das Recht als 'die Sicherung der Lebensbedingungen der Gesellschaft in Form des Zwanges' definiert . . . so ist übersehen, dass 'die Gesellschaft' nicht erst vorhanden ist und nun durch das Recht 'gesichert' wird; sondern dass 'Gesellschaft' hier nichts anders bedeutet als: rechtlich verbundene Menschen: so dass das Recht hier nicht sowohl sichert, als vielmehr die Gesellschaft in der Erfahrung überhaupt erst *konstituiert.*"

Wirtschaft und Recht, 2 Aufl., p. 486.

telling what in the concrete ought to be without carefully consulting what is and has been.

The extent of the common foundation on which these thinkers stand can best be judged, I think, by defining a little more closely the nature of this general problem, How the ideals or standards to which law ought to conform are related to the changing and relative facts of legal history. How is What-ought-to-be related to What-is?

§1.

The law of any place and time is either subject to criticism, or it is not. Unless the idea of 'improvement' and the idea of the 'law' are somehow incongruous, there must be at least a logical distinction between what the law is and what it ought to be.

This is so evident to common sense that any opposing view would seem possible only by way of reaction from some atrocious misuse of the idea. It was the fate of the Natural Rights school to provoke such a reaction, and to send an entire century of legal philosophers burrowing among the facts of law past and present for instruction which they agreed could not be found in ideals set up in total independence of history.

Now, at the opening of still another century, we find common sense once more taking courage. The Natural Right-ists were right in at least one respect: the question, What ought the law to be? is a pertinent question, and they were even right in assuming that

the human will had something to do about it. But legal philosophy has learned a lesson, and will never again part company with the facts: history, relativity, evolution, change, are articles in every creed; and the difference among thinkers is chiefly in the way in which these ingredients of fact find their way into the ideal.

§2.

The logic of the situation is interesting, and leads to some doubt in my mind whether it makes any ultimate difference which we adopt as a standard, what is, or what ought to be, if we are thorough enough.

If we begin with the most radical resolve to see nothing but facts, we shall discover *this* among the facts: that the law exists not for men who are asleep but for men who are awake; that the law is mounted in men's minds, in minds of those who make it, and in the minds of those who obey it. In the minds of those who obey it, it has a degree of authority—a psychological fact—and the most positive of the positivists discovers that this fact is not due simply to the other fact that the law exists. He finds himself referring it to further facts, as that the law has evolved, and that Evolution doeth all things well. He may decide that, as a fact, what is authoritative about the law is, after all, what is natural in it: and then he is forced to recognize that where men are meddling with nature, or where nature is obliged to work through men, as in the case of law, there will be a *more or less* of that authoritative virtue of 'naturalness' in the product,

and the distinction between what is and what ought to be reappears among his facts.

Or if he looks to the minds that made and are making law, he cannot ignore the fact that those minds are wills and have ends toward which they work. To report truly what the law *is*, in their minds, would be to report it as a resultant of various psychological motives, one of which is a theory of right, more or less vaguely in evidence.

If deference to existing law should go to the limit of accepting the law without change, that would involve the most violent breach with the law as it is; for it would mean total discontinuity with the *effort of will* which is behind the momentary state of the law. One who proposes to imitate most slavishly a thinker or a doer cannot do so by picking up his result: he is a false imitator unless he becomes in turn a thinker and doer, and so *departs* from that result, in the direction toward which the original mind was aiming.

Thus, any law-maker who wants to know what to do, and who is told that he may find out by studying the law as it is or has been, is told nothing untrue; but unless he is told more he is told nothing at all. For he can only know what the law is and has been by knowing what the thinking and willing *meant* that produced it; and he cannot find that from the visible facts, but only from a true interpretation of them gained by his own effort.

The Historical School, as I see it, was perfectly right in saying that first premisses for all law have existed in all past law; the difficulty is that this state-

ment either gives no guidance at all, or else false guidance. For the premisses in question have existed in the form of obscure strivings; and these cannot be understood or used until interpreted on the basis of human nature. And since it is in some ways more convenient and promising to consult the human nature one finds in himself than the human nature he can only guess at in the tree-dwellers, or even in the Romans, the historical method must remain a rather helpless method unless lighted up by independent sources of interpretation.

History cannot be ignored; but history cannot be relied on alone. This seems to me to be the total outcome, on this question, of nineteenth-century speculation; and this is the common ground of Kohler and Stammler.

§3.

Wherein do Kohler and Stammler primarily differ? They differ in their view of the independent guide which must be taken to eke out history in determining what the law ought to be.

Kohler, remaining close to the actual movements of historical change, finds that *every phase* of the changing body of civilized life *has its 'ideal tendency':* and to extract that ideal tendency is to learn, as from the facts themselves, what the next facts ought to be.

Stammler undertakes to fix the law-maker's attention on certain formal preconditions of all association whatever, and so to find *standards which are always*

valid. The application of these standards, however, will vary from time to time, so that we have a 'natural law with changing content.'

To Kohler's mind, Stammler's standards are too rigid. They amount to setting up "definite requirements for individual and social life that exist once for all," whereas in truth there can be no such final formula. Stammler, for example, will not agree that slavery has ever been right: while to Kohler's mind, "nothing could be more preposterous" than to refuse this concession to historical relativity. These different judgments on slavery furnish a capital test of the differences of these two philosophies: it will be well worth while to examine the reasoning by which, in each case, the judgment is arrived at.

§4.

KOHLER reasons from the necessities of the development of culture. These are the supreme concerns in human affairs, and human rights, important as they are, must give way to whatever belongs to the given moment of cultural growth.

No one who looks at the matter entirely from the standpoint of . . . human rights will be able to appreciate slavery in its historical development. Human rights are not advantageous to every development: technical arts must advance, humanity must make progress in industrial life, and for centuries this goes on with the sacrifice of human life. The sacrifice to culture is the highest sacrifice that the individual can make; but it is also one that he must make.

This argument will show clearly enough why, if Kohler were selecting a patron saint from classic German idealism, he should choose Hegel rather than Kant.

The Hegelian metaphysics gives Kohler his confidence that the ideal is embodied everywhere in the course of history; or rather, it lends theoretical support to his vivid appreciation of historical variety, his Protean ability to find himself at home everywhere and in all ages. Hegel assures him that the reality in history is cognate with ourselves; and that we are here to work with it and to know it. What repels him in Kant and all his works is the dualism which distils the forms of experience away from their matter, as from an irrational stuff due to an alien and unknowable entity; and gives these forms an *a priori* character, ruling changeless over all change, while still they shut us out from any perception of things as they are. Kohler believes with Hegel that our knowledge of the real powers that rule the world is not checked at this point by the hedge-fence which Kant, like a self-appointed prison-warden to "every future metaphysical aspiration," has dogmatically set up. Whatever gives us such *self*-knowledge as we have, that same operation gives a knowledge of the selfhood of the great world, and we find that

> essentially the activity of the external world and the activity of our own ego are the same, and each of us is 'a breath of eternity,' *ein Hauch der Ewigkeit.*[4]

[4] *Philosophy of Law,* tr., p. 19.

Hence Kohler is ready to go at least as far as Hegel in recognizing what ought to be in what has been and is.

Every social structure has been an effect, among other things, of reason working out its own notions of what ought to be. This is what Hegel had in mind when he said that what is, is rational. However, he did not say that all which *exists* is rational, but only all that is *wirklich;* and the *wirklich* is rational, because, and only because, of the other part of the saying, namely, that *what is rational is wirklich;* that is, that the effort toward reason must be worked out in the facts, and that whatever is reasonable in them is the substantial part of them.

If one believes, for example, that the present form of property or of the family is wrong, he may be right. But if he says that either of them is not right, he is wrong. For whatever else they may be, the existing property and family are efforts toward reason, and furthermore, they are efforts in the concrete, not in the air. On the first ground, they are absolutely right; on the second, they are immeasurably superior to any idea that as yet is a *mere idea.* And no new form can be right which comes in with the jaunty air of displacing an old one. It can only become right by becoming *wirklich,* that is, by connecting with the living reason and conscience already at work in the world.

It is in this particular sense that for Hegel all law must be positive, and that all philosophy of law must build on fact.

But in his judgment on slavery, Kohler out-Hegels Hegel. For Hegel said of slavery that it was once both wrong and right. It was *wrong* for masters as well as for slaves, because each accepted the false definition of the slave as a being having consciousness but not self-consciousness, and thus as lacking the capacity for free self-control. It was *right* as the only way by which, at a certain stage of development, when some men had gained the spirit of self-assertive freedom, that spirit could be made the property of everybody. For those who had gained that spirit were in honor bound to use it, and in using it to subjugate others: while these others in turn, the mass of men, had to learn that they were free by first denying that they were slaves.[5]

To Hegel, the one thing greater than personal freedom at any time is the general condition for a greater freedom. To Kohler, the exigencies of industry, the necessity for a wide and long discipline in drudgery, the interests of the technical arts, all of these as conditions of civilization, are interests weighty enough to subordinate the claim of personal freedom. For the fixed formulæ of Stammler, Kohler would substitute the changing requirements of progress as the guide for law. "The requirements of the law are the requirements of culture."[6]

What specifically Kohler means by culture, or civilization, we shall inquire in due time. Meantime, let us see how Stammler reasons on the slavery issue.

[5] *Grundlinien,* §57, note and addition.
[6] *Philosophy of Law,* tr., p. 58.

II.
IS STAMMLER GUILTY OF RECOMMENDING FIXED STANDARDS?

§5.

Stammler reverts to the question of slavery in his *Theorie der Rechtswissenschaft*, published (1911) two years later than Kohler's *Lehrbuch*.

He here takes notice[7] of 'certain writers' (*einzelne Schriftsteller*) who contend, in agreement with Treitschke, that the introduction of slavery marked an advance in civilization. But it is a confusion of thought, he argues, to say that slaveholding is more rightful than the killing of prisoners of war, since both practices lack the character of right altogether. This is not to deny that slavery may have been a stage, even a necessary stage, on the way to the possibility of *richtiges Recht*. But in no case can it be called a right arrangement: for 'right' in the relation between two wills implies a community of willing; and where the willing is all on one side there is no community,—ergo, no right. It is a contradiction in terms to speak of binding two wills in a community of obligation in which one of them is treated as non-participating. Hence, while the relation of master to slave may, historically, stand at the threshold of right, yet like most thresholds it *just fails of being inside*,—it marks the formal limit at which the application of 'right' ceases.

[7] Pp. 545-550.

So far, the logic seems to be with Stammler, if we accept his principle that where there is no community of will there can be no right. Hegel and Kohler are inclined to justify the situation by what they see coming out of it,—for if right comes out of it, right in some more primitive state must have been in it,—but this, for Stammler, armed with his criterion of the community of wills, is equivalent to a confession that the stage of right has simply not yet been reached. An appeal to the necessities of industrial efficiency or political power is an appeal to ends which are indeed valuable, but which, just because they are particular and concrete, can have no unconditional validity. They, in turn, require to be measured by the final standard of the 'community of free-willing men.'

§6.

But how does Stammler reach the conclusion that this ideal of a community of free wills is the absolute standard, and what does it amount to in ordinary application to law-making?

The clearest statement of his fundamental argument that has come to my notice, and one of the latest, is in an address made in Berlin in 1918 on Mandeville's Fable of the Bees. It was a public address: it was the result of an evident effort to be at once as simple and direct as many years of study enabled him to be, and as cogent in regard to first principles as first principles permit. Let me restate here the substance of that argument.

The appeal of Mandeville's Fable consists in the fact that we all think we know by inspection when a community is in good condition, and when not; we are all ready to accept without examination Mandeville's tacit assumption that a materially prosperous community is a community that satisfies the wills of its members. But this appeal is also its fallacy. It will not do to take for granted without further inquiry that the first state of this community of bees, in which private vice and greed minister to public wealth and power, is a wholly good one; nor yet that its second state, in which, by dint of self-denial and the sense of duty of its members, the community declines, is a wholly bad one. If we are to get to the bottom of things, we must have a criterion for a good condition of the state.

A second thought will make it clear without argument that neither the wealth and power of the first state, nor yet the asceticism of the second, have absolute value: presumably both of these states were in an unhealthy condition. As for that unhampered freedom of the individual (which Mr. Bertrand Russell still celebrates as the chief of all political goods), that will not do for a fixed standard, for it clashes with the restraint involved in all law and order. Neither will the greatest happiness of the greatest number serve the purpose: for there is no such thing,—there is no subject for this hypothetical quantity called 'the greatest happiness,' and without a subject the quantity itself is non-existent. So for all ends which involve the good of a supposed entity

such as 'Society': the idea of the *Volk*, as a real personality, is a "*fatale moderne Mythologie*"; the community as such has no feeling; and hence there is nothing here to which legal or political effort can be directed.

To find a valid criterion, we must first think of what a community essentially is,—a union (*Verbindung*) of wills which, apart from the community relation, tend to clash with each other, to treat their own ends as so important that each one is ready to make his neighbor a mere means or tool to realize them. And as the neighbor equally tends to reciprocate the process of reducing-to-a-means, it becomes clear that none of these particular ends can be binding upon any other by the mere fact that it exists or has arisen: still less can it be binding upon all.

Per contra, any end which is to be binding upon all must be freed from whatever is 'particular' to the interest of one or another member or group of members. But if we leave out all objects that can have such concrete but limited appeal, what remains? Unless there remains some object of regard which can do precisely what the particular objects cannot do, namely, subject all my private aims to the requirement of union, the requisite *Verbindung* will not take place. It must be regarded as standing over me, as custom, convention, and even brute force, have stood over men in times past, and do still stand to some extent. But while these powers, custom, etc., have their ascendency largely because they assume the place of the legitimate final end, and don its clothing, it is

evident that they contain much that is adventitious. They are not what binds; they merely symbolize it. We can only say that whatever actually binds men, so far as they are rightfully bound, lies in their quarter. But what is it that binds them?

Stammler's answer is dogmatic. The argument which leads to it has the force of excluding other answers so far in the field, not of proving his own standpoint by necessity. His answer is this: "The only thing which can serve as absolutely valid standard (*Richtmass*) for all possible striving is a *purely formal* method of guidance in the shape of an ideal object of thought which directs one's judgment" (p. 27). Each individual must recognize (and to some extent does recognize) the fact that his own particular ends are particular, and therefore not absolutely valid; each one conceives a condition in which he would be free from the domination of such partial objects, in view of a completely legitimate and imperative object which his purified will would seek. And if the ideal condition of purity of will (*Willensreinheit*) were reached by all, then (as we all dimly recognize) the business of bringing about social solidarity would likewise be ideally simplified: for there would be no disposition to use any member as a means, beyond the point at which he is himself served by the union, so that the united willing becomes a means to his ends. Such a community would be a community of free-willing men. And this ideal of 'pure community' (*reine Gemeinschaft*) is the ideal which more or less blindly stands over each actual will and

constitutes the element of 'right' which it recognizes in the concrete agencies of social control.

§7.

Clearing this notion of Stammler's verbiage, it seems rather an empty one,—so empty indeed as to be perhaps slightly perverse. For what else does it amount to than the proposition that the whole valid end of a community is the *existence* of a community; or, that communities have nothing else to work for, in their notions of right, than simply *to be communities* in the perfect sense of that term,—working out in all their arrangements the principle of consent which is involved in any free union of wills? A demand for consistency may, of course, give any community work enough to do for some time; but does it cover all that is needed in judging actual legislation? Is it not an attempt to make a necessary condition do duty for a sufficient condition?

Stammler, under the accusation of too great fixity, not only acknowledges, but insists, that such a pure form affords no fixed precepts of right: what it establishes is rather a procedure for the mind of one who undertakes to determine what regulation at any time most nearly approaches *das richtige Recht*. When one, in the above-named spirit of *Willensreinheit*, undertakes to judge as between various alternatives which one of them is governed by the ideal of a pure community, he may light on a decision which for the time and place will be, not absolutely right,—

for in history there can be no absolute right,—but objectively right. Stammler's guides are simply, as he is fond of calling them, *Richtlinien* or *Blickpunkte*, for the mind of the reflective law-maker.

But there is room for skepticism as to whether such *Blickpunkte* are capable of doing actual work, or whether the work that they seem to do in Stammler's hands is done by them or by some further criterion unacknowledged or undiscovered, which the condition of *Willensreinheit* (implying a lack of strict logical deduction from criterion to application) allows to enter unobserved. It might seem as though such purely formal criteria, instead of being too rigid, as Kohler complains, are so empty of content as to permit any filling. Looking backward it is true, slavery may be judged to be non-right, because it lay just below the threshold of right-relationships; but this is not to condemn it as wrong;—and as a matter of definition Kohler might concede the point,—the institution being admitted to be historically necessary. But looking forward, nothing would seem to be excluded as impossible: for the more the community serves any member, the more it may be justified in using him, in turn, as a means to its ends. Thus the tables seem to be turned upon those who accuse Stammler of putting history into a strait-jacket: Kohler demands much more of his legislator; the question seems rather to be whether Stammler demands enough.

It is a matter of logical interest to note that Kant's theory of the standard of right in morals has had the

same fate of being accused of two opposite errors, of being too rigid, in view of the relativity of human situations, and on the other hand of being too empty, and commanding in all strictness nothing at all. Kant is commonly accused of being an impossible rigorist in morals; yet Dewey makes Kant remotely responsible for the late war because of the emptiness of his moral rule: Kant's categorical imperative, says Dewey, prescribed an empty form of duty which his successors felt obliged to fill out with some usable absolute end; and the State was the end which in Hegel's philosophy came most plausibly to hand. Now we can hardly hold both of these opposite criticisms against either Kant or Stammler. And it will be only just to our author to examine the operation of his own principle, as he shows it at work. We may take for that purpose the case which he cites in the address referred to, the case noted in the Prussia of Frederick the Great as the case of the miller, Arnold.

The mill in question was located on a brook which emptied into the Oder. The property owner just up-stream from Arnold installed certain carp-pools which were supplied from the mill-race passing through his property. A sluice in the lowest pool retained the water according to need. Now Arnold could no longer run his mill with regularity. He fell behind; judgment was given against him, and the mill was sold at auction. His relatives brought a complaint against the owner of the carp-pools.

The latter replied: Inasmuch as he did no more than make use of his own rights, it was no concern of his whether there was water enough for the mill,—a matter of simple common

sense: for otherwise a serious injustice would be done, in that he would be deprived of his evident property and his clearly inherited right.

The neumarkische Regierung, as court of first instance, and thereafter the supreme court (Kammergericht) supported this contention, and rejected the plea of the Arnold family.

But the king was highly indignant at this judgment. It is well known how he intervened with a severe sentence of his own. The judges, who had certainly given this judgment according to their best conviction, were dismissed, sent to prison, and ordered to make good the damages to the Arnold family from their own private means. Arnold received back his mill, and the carp-pools were destroyed.

We know [adds Stammler] how greatly the gifted monarch suffered from uncertainty, in this procedure. . . . (pp. 29, 30).

But the king was in substance right, and the judges, who were acting according to the precedent of their day, were wrong; they were wrong, thinks Stammler, because they were thinking in terms of a bundle of separate private rights without reference to the idea of Community (*Gemeinschaft*),—it did not occur to them that social life means nothing unless it means that the struggle for existence is made a common struggle, and from this fact it follows that "each may use his right only with consideration for his fellow."

And wherever the law makes reference to good faith (*Treu und Glauben*), reasonableness (*Billigkeit*), avoidance of misuse, etc.,—in short, to undefined standards,—this same ideal of a community of

free-willing men must be brought into action. One cannot derive from this general ideal particular rules of law; but one can derive from it certain principles which may serve as directions (*Anleitungen*) to anyone who will "sink himself in their spirit," enabling him to reach an increasing certainty of result. These supplementary Directions are two:

(1) Among contradictory possibilities, that one is to be chosen in which each of the parties is respected as an end-to-himself, that one to be rejected in which he is treated as a means to the subjective wish of another;

(2) No one among those who are united, in right, for a common struggle for existence, may be excluded therefrom by any personal arbitrariness.

The case of Arnold, and the following discussion, would seem to show that Stammler's criteria are not devoid of working-power. One cannot literally deduce anything from them, but one can still judge by them, and with good effect. They succeed in expressing something of what the common consciousness of mankind means by 'right' in law; and they should be of some actual service to a bewildered law-maker. A pure form need not be an empty guide: to realize consciously and in detail what is implied in the beginning may be at least a valid part, if not the whole, of an absolute end of common effort; just as a good part of the rules of personal morality can be drawn out from what is involved in the simple act of conversing with your neighbor. For that act professes honesty, a degree of equality in mind and will, a desire to reach

common standards of judgment, etc. So '*Gemeinschaft*' has something to say to the law. But if this is true, is the other criticism perhaps justified,—Kohler's criticism to the effect that the standard is too rigid?

§8.

If we judge a standard too rigid which sets up certain "definite requirements of individual and social life that exist once for all," I am inclined to think that Kohler's criticism must be accepted.

For however Stammler insists that his Directions are not fixed rules of law, the real question is whether they will or will not always give the same answer to the same concrete problem, regardless of time and place. And I see no way of evading the conclusion that wherever these criteria are capable of giving an answer at all, that answer (as in the case of slavery) will always be the same.

Of course, this type of right will have a "changing content," for different circumstances will bring forward *different questions.* Even slavery, a name which we use to cover a multitude of different relationships, does not always present the same question, whether socially or psychologically. It is unnecessary for Stammler to assume that 'consent' or 'participation in an agreement' is always a matter of yes and no rather than a matter of degree; and that there can be among adults no right-relations which resemble those between children and parents. These considerations might not change Stammler's judgment; but

certainly there is nothing in his view to require him to think the same way regarding an institution having the same name, in spite of inner differences. At the same time, his criteria are not different in this respect from any fixed generality,—such a rule, for instance, as "Obey the government." For any such fixed rule will have a 'changing content,' according as the ruler is a Dahomeyan despot, a Thibetan Lama, or a British Parliament. The phrase 'changing content,' therefore, is perfectly innocuous and undistinctive: it provides for an historical relativity, but a relativity which may leave any number of general requirements unchanged. It provides an answer only for those who imagine that any element of stability implies a block universe. It leaves a wide gulf between Stammler and Kohler,—unless, indeed, it should prove that Kohler is less a believer in relativity than he thinks he is.

Let us turn then to examine Kohler's standard and its application, asking in what way and in what degree it is relative to time and place. When Kohler says that "human rights are not advantageous to every development," does he mean that there is a better and more elastic definition of right than that of Stammler? or does he imply in that word 'advantageous' that law has other values to consider than the value of abstract justice? What, then, does Kohler mean by the 'culture' or 'civilization' that is to give law its standards from time to time?

III.
KOHLER'S STANDARD AND ITS APPLICATION

§9.

The first impression of a reader of Kohler is that his standard is nebulous. Law is to serve the ends of *Kultur:* but what is *Kultur*, and how can it be determined whether or not a proposed measure will serve it?

Kohler has even been currently accused of having no clear-cut definition for his great word.[8] But in all fairness, he has been far less remiss in this regard than the accusation suggests. The early chapters of the *Philosophy of Law* may be taken as a running description of Culture: it is shown to be an outcome of various psychological forces, such as the racial disposition, religion, family instinct, food-getting (especially in the form of the instinct for wealth), love of domination, and "other principles of more refined nature." In his *Moderne Rechtsprobleme* he

[8] A fashion which may have been started by his colleague, Lasson, also a neo-Hegelian, in an early review of Kohler's *Lehrbuch* which appeared in *Archiv für Rechts- und Wirtschaftsphilosophie,* March, 1909. This review is translated by Kocourek and published as an appendix to the translation of *Philosophy of Law.* See note, p. 329.

Our word 'culture' does not accurately translate Kohler's word Kultur. As Dean Pound justly remarks, the nearest equivalent is 'civilization.' I shall have, however, so frequent occasion to refer to Albrecht's translation in which Kultur is rendered 'culture,' that it will be simpler to retain the word, distinguishing it by a capital initial.

has given a definition which, apart from the indefinite quantity, "the highest possible," is explicit: Culture, he says,

> is the development of the potential forces that lie in mankind, to the end of the highest possible development of human knowledge and of human creative power.[9]

And in an article in the *Archiv für Rechts- und Wirtschaftsphilosophie* for January, 1910, he states that

> the essence of Culture in the sense of the Philosophy of Law is the greatest possible development of human knowledge and the greatest possible development of human control over nature.[10]

At the same time, one surmises that Kohler feels a temperamental—and reasonable—distrust for sharp definitions of things that cannot be sharply defined, and that he is willing to take the consequences of whatever vagueness may remain in the definition.

If Culture is not a thing of which one can easily say Lo here or Lo there, it is certainly not a standard whose application can be reduced to rules of thumb and used with mechanical accuracy by every tyro. But this does not make it untrue. Kohler is willing to allow that science has still a long way to go before the standard can be made wholly tangible:

> The culture of an age is connected with the soul and spirit of a people. To fathom them is the task of folk-psychology, which, it must be admitted, still needs to be

[9] Page 2.
[10] Quoted in *Philosophy of Law*, p. 329, note.

greatly developed. . . . Moods follow one another owing to psychic necessity, and owing to laws that are yet partly unknown.[11]

§10.

Inability to reduce the standard to formulæ does not make it untrue, we said. But neither does it imply that the standard cannot be known or used. And it is far from Kohler's intention to recommend an unknowable or unusable standard. If one must be something of a seer to catch the pulse of Culture, it is a part of the Hegelian view of things (as we saw above) that *the seer can do it;* and Kohler would add, he does not need to wait "until the shades of night are gathering" to recognize the idea of his own time, and apply it.

If we ask *how* such a standard can be known and applied, there are two conceivable answers. It is conceivable (1) that a community should put its trust in superior men, having the needful power of vision; it is also conceivable (2) that Culture has an initiative of its own, and can somehow make its own demands felt, whether through popular movements or through the force of tradition, or even through an organized General Will, considered as a real entity. Kohler, in different contexts, seems to rely on both of these possibilities. He has no discussion of the psychological processes whereby law-makers or judges are to bring the standard into effect in concrete law; but from various utterances one may infer his meaning.

[11] *Philosophy of Law,* p. 36.

When he most distrusts the individual law-maker, he appeals from his judgment to that of a higher entity. "The law-maker is a creature of his own time"[12]—and what is the inference from that? Shall not one who is the creature of his time be trusted to speak the Mind of his time, inasmuch as he cannot help doing so? On the contrary: such an inference would be a perfect example of the misuse of the principle of finding what ought to be in what is. The fact that he is a creature of his time simply robs his thought of final validity: it imposes the necessity of "interpreting his thoughts sociologically." And who is the authorized interpreter? "The State can obtain a correcter perception of a right than can an individual."[13] And yet the State itself may not act independently: it must collaborate with "Culture" as an original and creative entity. For

> Culture, having created not only the law but also rights, the State should not overthrow these rights and trample them underfoot; but while upholding them as far as possible, should proceed with the development of Culture.[14]

Here, in one sentence, Culture is represented as both the cause and the effect of law-making action—an example perhaps of those common circular relationships in nature described by Aristotle, as when eating is both an effect and a cause of physical activity; but in any case, the authority seems to be a composite one, and not confided to any individual mind.

[12] *Lehrbuch des bürgerlichen Rechts.*
[13] *Philosophy of Law,* p. 243.
[14] *Idem,* p. 208.

In other passages, however, it is evident that Kohler is placing ultimate reliance on "Far-sighted minds," as might be expected from his profound admiration of Nietzsche's sociology. If history were a matter of the logical development of civilization, as Hegel thought it to be, it is conceivable that we might entrust our fortunes to the necessary working-out of that logic; or—not to be too passive—it is also conceivable that a philosophy of history might, after all, find the clue to this logic, and so derive from it a guide for legislation. But here Kohler deliberately rejects the Hegelian theory: history is no such logical process: it is full of irrationality and of lapses: "unreason and brutality operate side by side with wisdom and stability." Culture itself has its wayward and atavistic moods: law-making can never be a craven study of 'forces' such as Brooks Adams recommends. No: there is the permanent possibility of

> a schism in legal tendencies between the masses, on one hand, struggling for a legal system that will correspond to their own uncultured state, and in opposition, far-sighted minds trying to bring about a change. To realize this we need only recall the offering of human sacrifices, the persecution of witches, and note, in our own day, the custom of dueling, still regarded by some people as indispensable. These are the times when the law-giving spirit that stands above the people is especially called upon to wrestle with the popular mind, and to diminish its illogical efforts.[15]

The "far-sighted minds" here referred to may, of course, be professional law-makers; they must in any

[15] *Philosophy of Law*, p. 58.

case be "philosophers of life": they must assume the responsibility of knowing when a movement of 'culture' is a movement against Culture, and of setting up opposition to it:

> The far-sighted legislator can mitigate much. Even if the whole mood must be struggled through to the end, yet the philosopher of life . . . can soften the pathological tendencies, and help out in one way or another, in order either to further the development or to ameliorate the pain and suffering that it involves. That will be the correct attitude for the legislator, if he is also a philosopher of law.[16]

Thus while Kohler believes fervently that "the development of culture must proceed through the human soul"; and while this means to him that "the folk-soul develops rhythmically, *needs* its aberrations, its mad pranks, its irritabilities, cannot always keep on the straight path"; he believes with equal fervency that it is possible to know an aberration to be such at the time when it occurs; that such knowledge is possible to the "far-sighted men" of a given age; and that it is right for them to oppose such aberrations in the name of Culture itself.

I have deemed it worth while to dwell on this question, how Culture is to be known, both because of its intrinsic interest and because it has important bearings on every part of Kohler's system of thought.

It becomes evident, I think, that in the last analysis the relation of the law-maker to his standard is,

[16] *Philosophy of Law,* p. 41.

for Kohler, a mystical relation: that is, the law-maker would never be in a position to say, "Culture demands this and I can prove it," but only, "My vision tells me that Culture demands this,"—and yet he might be sure of his vision. Humanity is "destined to a deep knowledge of the world, and of the supermundane": this is the substantial basis of the religious feeling which men pour out, not alone into the world beyond, but into all the business of civilized living, and which, in Kohler's view should govern their attitude toward the State, justice, and law, as well as to all other institutions which have the common life in them. "The idea that tremendous spiritual powers permeate both nature and mankind . . . is bound up with our human nature, and follows us from the beginning of time up into the highest circles of Culture."[17] But there is no way of demonstrating what those powers may require. The relation of the law-maker to Culture remains, therefore, that of a mystic to his deity. Kohler then, as well as Stammler, falls back upon intuitive judgment and upon the intuitive judgment of specially qualified minds.

§11.

But there is a further important corollary from this discussion of how Culture is to be known. Namely, that Kohler, in spite of himself, adopts *certain fixed elements* into his standard. Observe how this follows:

When one says that law should regulate itself by

[17] *Philosophy of Law*, p. 45.

Culture, there are at least three possible meanings of that saying in respect to the historical movement:

i. Law should aid and abet *existing Culture;*
ii. Law should aid and abet the *Culture just now about to be,* growing out of the present;
iii. Law should be directed to *Culture as a distant end,* some features of which end can even now be recognized as valid and obligatory upon us.

Now a good relativist ought to reject the third of these, and might adopt either the first or the second: and Kohler's language leaves no doubt whatever that as between the first and second he means to adopt *both.* The law must "conform to culture"; but it must also "aid in developing the seeds of culture."[18] Law must conserve whatever good there is in the existing order: "For progress should always be made in such a way that the fruitful seeds of what is passing are retained. This is what is valid in the logical dialectics of the world-process which Hegel has described to us in such a seductive way."[19] In so far as it attends to existing Culture, its business is to form an idea of what that Culture demands for its own perfection; and so lean away from what it literally is in the direction of what its own type demands: in this way, the first standard tends to approximate the second:

> Not every type of law one can think of would correspond to a given period of Culture, but only such a type of law

[18] *Philosophy of Law,* p. 58.
[19] *Idem,* p. 43.

as should undertake to develop the germs lying within the Culture in question, and to bring it nearer its own ideal.[20]

Thus Kohler carefully distinguishes, still like a good relativist, the ideal which is individual to a particular Culture and an ideal of Culture for all mankind. He proceeds in the same context to emphasize this position:

> Law must be different in every different Culture, in order to realize its own object. . . . There can be, therefore, no such thing as an eternal law, nor is it admissible to prophesy what shape law will take hundreds of years hence. No Plato and no Aristotle could foresee our own times. . . . What we are able to do is to perceive the outlines, the general outlines of the world-process, and to pave the way for the progress of law in the immediately succeeding time.[21]

These emphatic words might well settle the question, as they have settled it for Kohler's current interpreters. They would settle it, if it were not for the logic of that *correction of Culture* by "far-sighted men" which in our previous section we were considering. In the name of Culture, these men must hold themselves free not alone from any existing Culture, but also from any existing tendencies. They must know when Culture is moving forward, and when it is deviating or going backward into "unculture." In order to know these things, Culture must live in their minds in some fashion independent of existing historical currents. And there is not wanting evidence

[20] *Moderne Rechtsprobleme,* 2 Aufl., p. 10.
[21] *Moderne Rechtsprobleme,* 2 Aufl., p. 11.

that it so dwells in Kohler's own mind and that, so far, he accepts the *third* alternative above stated.

For Kohler frequently speaks of Culture as a system of *Zwecke*, or ends, which have more than passing validity, as when, at the outset of this same booklet, he remarks that "anyone who proposes to know the law must know Culture, and must know what goals (*Ziele*) human culture pursues." His own definition of Culture is certainly not without content: and if his definition is to remain valid, as it certainly is intended to do, this content determines something regarding the condition toward which human effort in history is always striving,—a maximum of knowledge, a maximum of creative power.

Kohler's relativistic agnosticism about the future is unable to deter him from stating in the most vigorous language the broad outlines of human destiny:

> Humanity is destined to form and to rule, to form in the sphere of art, to rule over the earth: and perhaps, by virtue of technical science, over further fields of the universe.[22]

And to this end, two things are "necessary" (Kohler does not say "necessary in our own time," nor with any other condition; he means "necessary now and always"):

> in the first place, an intensive development of the individual, with the highest possible training of all the mental powers; and in the second, steady cohesion, in order that humanity may not fall apart into individuals . . . for nothing great and whole can be attained except by the devoted, or at least, successful, collective activity of individuals.

[22] *Philosophy of Law*, p. 49.

If Stammler had been writing this last passage, he might have phrased the idea thus: that "Pure Community, or Community ueberhaupt is a necessary condition *a priori* of all positive cultural values"; and he might fairly maintain that his own Directions or Blickpunkte are all implied in it. Kohler would presumably loathe such language; but the difference between him and Stammler, it now begins to appear, is that he, Kohler, in his standard of Culture, is including decidedly *more* than Stammler of those "definite requirements of individual and social life that exist once for all" which in Stammler aroused his hostility.

Indeed, Kohler's relativism, expressing his love for historical variety, has to contend within him against his thoroughly Hegelian confidence in absolute knowledge. He cannot resign his claim to understand what it is that the world of Culture, and therefore of law, is moving toward. "Relativity affects the path," he says, "far more than the goal." "In the final development, it is reason that triumphs."[23] Wherever this ominously Hegelian word, 'reason' creeps into Kohler's text, we may know that the cause of relativity for the moment has given way. Law itself is a result of "the inner impulse that urges men toward a reasonable form of life."[23] And this means for Kohler first of all an overcoming of precisely the illogical factors of history, and the brutal impulses of the Volksgeist, and the subjugation of chance to calculability in individual affairs; and it means secondly that Culture is not simply moving on from one phase to an-

[23] *Philosophy of Law*, p. 21: *cf.* p. 59.

other, but that there is something *cumulative* about it, as there is about one of its ingredients, *knowledge*. But just in so far as Culture is cumulative it is possible to state some things which it will always contain.

I venture to believe that it would be quite possible, on the basis of Kohler's own doctrine, to set up principles for legislation which would be comparable with the two Directions of Stammler, or with the four principles of his earlier work, with the same claim for permanent validity, but with the chief difference that they would be decidedly more concrete. Why should we not coin Kohler's own definition of Culture into two such Directions, as follows?

I. Among contradictory possibilities that one is always to be chosen which promises to further human knowledge to the greatest degree:
II. No step shall be taken, however profitable at the moment, which threatens to lower the level of human creative power.

Whatever Kohler might think of such abuse of his definition, I conceive that the main difficulty with the Directions stated is that they do not sufficiently cover the ground that needs to be covered: we should have said something at least about the two permanent necessities for any future civilization, namely "steady cohesion" and "the intensive development of the individual." These necessities of Kohler's would furnish material for two additional Directions.

Thus it appears that in the substance of the matter Kohler, like Stammler, is only relatively a relativist;

and the changing content that he pleads for is mounted on a setting of principles whose persistence he silently assumes. If this view is right, the issue between Kohler and Stammler does not lie precisely where at first sight, and by general consent, and by Kohler's own estimate, it seems to lie.

But there is a fundamental issue between them; and we must make another attempt to bring it to light.

IV.
THE REAL ISSUE BETWEEN KOHLER AND STAMMLER

§12.

It is natural that two thinkers, both of whom depart radically from the temper of historical positivism about them, should vie with one another in exhibiting their concessions to that spirit and its belief in relativity. But there is a limit to the possibility, as well as to the value, of such concessions if we are to have any science of law at all.

For while nearly all of science deals with phenomena which change, the possibility of science depends on finding the permanent laws according to which change takes place: the success of science is proportionate to its success in finding these invariants in any system of transformations. The success of the philosophy of law will be dependent upon its power to determine what is permanently valid in our ideal for associated human beings. And there can be no particular scientific merit in keeping the area of this validity to a minimum, except the merit of caution in any inductive procedure. For there is *no* a priori *reason to believe that the standards of right for human nature are more variable than human nature itself;* and hence that the scope of legal philosophy must necessarily be more narrow than that of general human psychology.

But if it is the very business of science neither to

deny relativity nor to succumb to it, but rather to understand it, and find its law, this fact will control the efforts of Kohler as well as those of Stammler. If Kohler chooses to emphasize the *variations* of which he proposes to state the law, while Stammler emphasizes the *law* of which history shows the varying embodiments, this is merely a talking difference, and constitutes no scientific issue.

§13.

I WILL even venture to say that these two thinkers diverge much less than they think they do on the question how far historical change affects the sense of right itself, *i.e.*, whether we can say that "What is once right is always right." Stammler would seem to be for affirming this latter proposition, and Kohler for denying it; and their difference about slavery would seem to be simply a symptom of their difference on this question of principle.

But their apparent differences here begin to fade as soon as we place the question where it belongs: it is not a question of what was right in all past time, but of *what will be right in all future time.* Most absolute relativists are made by a vivid interest in the museum of historic customs of whose weird variety there is no end, and of which, fortunately, the ethnological consciousness is never weary. The impression made by even a slight acquaintance with this region is that "the *mores* can make anything right." But this proposition certainly does not follow from

the facts. It would be psychologically truer to infer that "a state of half-awakeness can prevent almost anything from seeming wrong."

At the basis of the psychology of history must be set the law of slowly increasing sensitivity and discrimination. It is only by degrees that men become self-conscious; it is only by degrees that they become individual persons; it is only by degrees that they become aware what a question of right is, and where such questions are located. Wherever men are found, there conscience is found,—conscience of a sort: but the questions that come up before any man's conscience vary all the way from the crudest hesitations about killing one's next of kin to the finest cobwebs of casuistry. History proceeds under a veil of semi-consciousness: even now there is much in our *mores* which will later become an issue of right, whereas now we merely shrug our shoulders about it or take it for granted. The gospel of violence in social affairs is merely the gospel of forcing an issue into a relatively numb public consciousness. The difference between waking and sleeping is not a difference of simple yes and no,—it is a difference of degree; and the human mind is never fully awake. To be sure, it always fancies itself in possession of the full day of 'consciousness'; its present degree of awakeness is felt as standard awakeness. But even the exaggerated awakeness sought for in intoxication, and in the chronic self-proddings of irritated partisanship, frenzied novelty-hunting, or hothouse forcing of the intellectual draft,—all of these artificial thinnings and blue-vein-

ings of the sensitive surface fall victim to the law stated at the outset of this paper: increased awakeness is paid for by a horizontal narrowing of vision and by disturbances of even judgment. The divine level of awakeness is not to be taken by violence, nor compelled by violence: history is enacted under a veil of semi-consciousness.

One consequence of this view of history is that the variabilities of custom are not to be interpreted by saying that men have judged differently about a question of right, but rather by saying that they have not explicitly judged at all. The question has not stung them awake, has not been brought into court. Under such psychological conditions, it is idle to ask whether their solutions have been right or wrong. So long as one's social status is accepted as a fixed datum of life, and it occurs to neither the high nor the low to challenge it, there is no question about the rightness of slavery, nor for that matter of widow-burning, or of trial by ordeal, or of torture,—for which last Kohler himself can find no good word to say.[24] The only question of any scientific importance is whether, when once the question,—any question of right—has been clearly put and answered, the answer remains valid *thereafter*. The question, What has been valid in the past? has little scientific value: but the question, What is to be valid in the future? may be capable of substantial answer.

[24] "The institution of divine judgment had one very evil result—the torture—one of the worst institutions that the erring human mind ever devised," etc. *Philosophy of Law*, p. 255.

If it is our psychological destiny to grow steadily in awakeness, our grasp of the idea of right ought to have something cumulative about it. It should be possible to distinguish two regions,—the region of the experimental and growing, and the region of the (approximately) settled. The era of the gospel of relativity was an era in which recognition had to be conquered for *any* region of experiment whatever. That point has now been gained. There are in all the world no prophets of a block-universe, whether of event or of ideas of right. Now it is time to observe that *all experiment intends to establish something;* and if nothing can be established, the interest in experiment itself is attacked at the root. For the sake of the experimental spirit itself, it is now necessary to make it clear that experiment can succeed,—that something can be learned, and stay learned.

It requires no psycho-analysist to discern that whatever Kohler may say about relativity, this is what he believes. It is inseparable from the Hegelian streak in him to believe—and occasionally to say—that "mankind constantly progresses in culture, in the sense that *permanent cultural values are produced*, and that man becomes more and more godlike in knowledge," etc.,[25] not omitting his knowledge of the principles of right. For when Kohler says that

> Rights in one's own person, or rights of personality, must be the starting point of every legal system: for every right requires a legal subject, etc.,[26]

[25] *Philosophy of Law*, p. 26.
[26] *Idem*, p. 80.

there is no indication that he means this proposition about "every legal system" to be subject to the conditions of historical relativity. In effect, I judge, Kohler subscribes to the belief that it is possible to increase, very slowly, our body of perception about the valid elements of right; and that this perception is not to be confined, as Stammler thinks, to mere formalities, but tends rather to assume concrete shape.

§14.

The real divergence between Kohler and Stammler will appear when we indicate the main reason for their apparent divergence. For the fact is that they are trying to answer different questions, and their answers have been treated as if they were answers to the same question.

Stammler is asking: *What are the invariants* in the standards of richtiges Recht?

Kohler is asking: *What is the whole duty* of the law, whether variable or not?

Stammler finds as answer to his question that there is an invariable element of right, a pure form indeed, but none the less obligatory upon all changing states of culture.

Kohler finds as answer to *his* question that law has *two masters to serve*, and not one only: it must serve right, and it must also serve a voluminous mass of interest called Culture.[27] The standards of right fail to account for the existence of a large part of the law,

[27] *Philosophy of Law*, p. 66, 208.

that part in which it undertakes to "promote and vitalize" the cultural interests of men quite independently of any question of right and wrong.

Stammler would hardly deny Kohler's answer to Kohler's question: for he was no proponent of a *laissez-faire* conception of the province of law-making bodies. Right is a condition of the structure of law, but it is not a description of all that the law has to accomplish.

On the other hand, Kohler would not necessarily deny Stammler's answer to Stammler's question. For he does not, as a rule, refer to Culture for an answer to the question what is right; he treats right as an independent problem, having its own standards. Thus, in dealing with the theory of punishment, he stands with Hegel in putting first not social expediency, but "justice" in the form of retribution. To regard punishment as a protection of society and a means of deterring from crime is "an exceedingly hollow and unreal view," and further "the whole theory becomes still more unendurable, because it implies that one must suffer for the sake of another,"[28] —the 'unendurableness' in question being no corollary of any cultural requirement at all, but hailing direct from Kohler's sense of right. Similar independence of the judgment of right appears in such utterances as these: that "it is right that a man should be responsible for his wrong, even though he use only natural causation for his own ends";[29] or

[28] *Philosophy of Law*, p. 283.
[29] *Idem*, p. 34.

that "rights (in persons) can extend only so far that the person still remains a person,"[30] etc., the latter having an almost echt Kantian sound.

So far, the two minds we are comparing jump together. But their real divergence appears immediately when we ask what is to be done *when the claims of Culture and of Right conflict.*

Kohler's answer is: abstract justice has to give way. And in this answer he is quite in accord with the spirit of Hegel, who placed his section on 'Abstract Right' at the beginning of his dialectic of freedom, as something to be passed beyond, sublated, in later stages.

Stammler would say, I believe, that the question is fallacious. It assumes that the claims of Right can conflict with the claims of Culture, which is impossible. For what is Culture, or what is it worth, unless it first incorporates Right into its substance?[31]

Kohler is full of the tragic necessity that the individual in history must make himself, if need be, a sacrifice to the requirements of the greater Being of which he is a member:

> Often the individual digs into the flesh of the community, while the community in turn annihilates the individual. This is the Calvary of mankind, where the spirit of universal history suffers every moment and dies, to come forth with new radiance from the tomb.[32]

[30] *Philosophy of Law,* p. 70.

[31] "Unter *Kultur* kann doch nichts anderes verstanden werden, als *das Streben nach dem Richtigen* im Erkennen wie im Wollen." *Sozialismus und Christentum,* S. 100.

[32] *Philosophy of Law,* p. 48.

The demands of culture often require the downfall of existing rights.[33]

It must be taken into consideration (in the errors of trial by divine judgment) that the sacrifice of the individual secured the peace of society. . . . Universal history often requires the individual to be thus sacrificed: the iron tread of progress tramples thousands underfoot. This is a terrible phenomenon which we must moderate and ameliorate as far as possible. . . . But here we must simply accept the ways of Divine Providence, in the consciousness that thus the progress of the world is accomplished.[34]

And with this indication of the final issue between Stammler and Kohler, we take leave of them, and pursue that issue on its merits, for ourselves. It must be said that Kohler is never passive in view of this 'terrible phenomenon.' He is clear that "the State should be not alone a 'Culture-State' but also a 'Legal State,' " so that when "the demands of Culture require the downfall of existing rights," there is great need for a "solution of the difficulty," such as is found "in the institution of expropriation, that is, in the possibility of destroying a right by giving suitable and adequate compensation."[35] Further, one may say that it is chiefly in retrospective judgments about the course of past history that Kohler seems to fall down and worship the harsh necessities of progress, seldom in regard to the things ahead of us. But on the point of theory he is without hesita-

[33] *Philosophy of Law,* p. 208.
[34] *Idem,* p. 253.
[35] *Idem,* p. 208.

tion: there is a higher and a lower obligation for the law, and the higher obligation is to Culture. Right must take the consequences. The issue is drawn with all necessary clearness.

V.
THE STANDARD OF JUSTICE AND THE STANDARD OF SOCIAL UTILITY

§15.

Let us take for granted, as a basis of argument, that there can be no such thing as fairly developed culture without the political State, and no such thing as a political State unless individuals are ready, in large majorities, to sacrifice themselves if necessary for the existence of the State. Let us agree further that it has been a condition of historical development, and will continue to be such a condition, that each generation of individuals is disposed to make some sacrifice for the following generation. Sacrifice in various directions is one of the commonplace facts of our social structures, and, we now assume, a normal fact.

We have, however, to make a logical distinction between the sacrifice of *self or goods* and the sacrifice of *justice*, where justice is known. Dreyfus, as a soldier, is professedly ready to offer his life for the sake of a State enterprise. But Dreyfus is not willing to sacrifice what he conceives as his rights even to the welfare of the Army or the State. In a discussion on the subject of military morale, an officer of much experience and of large responsibility maintained that if he knew an accused man to be innocent, and if he also knew that he was so generally believed guilty in his

regiment that an acquittal would lower the morale at a critical time, he would order sentence to be carried out. "Justice to individuals," he said, "is never more than approximate, at best: the interest of the cause is supreme. In the case of minor punishments, it creates a bad impression if an officer in command is over tender and solicitous not to be too hard on anybody. Briskness and summariness in dealing with cases of negligence, insubordination, etc., is worth more for the spirit of the unit than a painful and tedious exactitude, which gives an impression of indecision and weakness. Every soldier knows that he is likely to get some blame he doesn't altogether deserve. It is his business to put a wide enough margin between himself and trouble. Injustice is a misfortune; but some of it is a necessary misfortune." If such were the case in the military world, is it the case in the larger world also? Is the sacrifice of justice, as well as the sacrifice of goods, a part of the normal order? Can it be accepted as a principle for the making of the law?

Now everyone admits, as a matter of course, that a great deal of unintentional injustice must be expected in any actual society, if only from limitations of time and intelligence on the part of everyone (official or non-official) who has questions of justice to decide. But my belief is that there are no cases in which a deliberate sacrifice of justice is sanctioned by a higher good, not even in administering law in individual cases, still less in the making of a law. There are instances in which sacrifice (as in the condemnation of private property under the rule of

eminent domain) of an individual's interests to the greatest interest becomes a sacrifice of goods, whereas the same sacrifice, if made from individual to individual, would be a sacrifice of right. But there is no instance, I believe, in which a sacrifice of right, known to be such, is sanctioned by the common welfare. The principle on which the law must proceed is that no known injustice may be done.

This principle is recognized, though not avowed, by John Stuart Mill, and indeed by most of the Utilitarian school, without full awareness of its implications. For the formula that each one is to have full liberty to the point at which that liberty encroaches upon the like liberty of another, implies that I have no right to encroach upon your defined liberties for any good of my own, however great. The Utilitarian principle is abandoned, not merely when I see that I have to do with quality of pleasure as well as with quantity, but quite as much when I see that I must not undertake to trade off a little pain on your part for a considerable pleasure of my own. The right of property means nothing unless it means just that. The sum total of the pleasure of a society is to be held fixedly below what it might easily become by various simple redistributions, because those redistributions have no shadow of 'justice' in them.

§16.

In setting up the principle of 'no injustice,' as a rule for law-making, we assume that we have *some knowl-*

edge of justice or of injustice apart from the law, and apart from social utility.

We do not assume that we know a great deal about justice. Indeed, we are usually clearer about what is unjust than about what is just. It is unjust to condemn an innocent man; but if an innocent man is accused, the question what is just, as a means of righting the wrong, is a puzzle which has not been solved. It is unjust for me to refuse payment of my debt when I have the means to pay it; but whether justice is altogether satisfied by the simple act of payment is not so readily decided. We are sensitive to injustice as we are sensitive to pain; and like pain, we are more definitely and intensely conscious of it than of its positive counterpart, for very good biological reasons. But the principle we are here discussing does not even assume that *injustice* is always known: it assumes only that *in some cases* we can know what is unjust in independence of knowing what is good for society; and that in all such cases the law is bound to follow the rule 'no injustice.'

And let us add that this rule is not necessarily in opposition to the principles of social utility. My own belief is that it is not in opposition to those principles. I would be disposed to set up as an equally valid principle of judgment that

Nothing can be just which is certainly known to be deleterious to the total cultural interest.

But the point is that there is a range of cases in which the total cultural interest cannot be calculated

without taking into account an interest in 'justice' which has acquired a relatively independent force of its own. This interest is one of the goods which has to be included in the inventory of the social utilitarian: the duty of the law cannot be defined in terms of all the *other* cultural goods, leaving out the specific interest in justice, together with the deep psychological impulses of 'disinterested resentment' which have gathered about whatever offends that sentiment. When Dreyfus will sacrifice his life, but still will insist on a right, his insistence is not publicly regarded as a selfish act; for whoever insists on a right, insists on the interests of all others who have the same right, that is, of everybody under the same legal system, both present and to come. The amount of social good actually to be enjoyed by all these persons in virtue of any specific right is a *wholly unknowable quantity;* and no utilitarian calculus can be of the slightest value to us in weighing it against the possible benefit of satisfying a general desire for the punishment of the innocent prisoner. We cannot certainly know that the acquittal of Dreyfus will be deleterious to the total cultural interest; for we cannot know what the total cultural interest is. But what we do know, in this case, is that the punishment is unjust. And we know further that if and when the knowledge of its injustice becomes a part of the consciousness of the community, a definite damage is done to the confidence of that community in the working of its own law. On the principle of social utilita-

rianism itself, then, we should say, as a counterpart to the principle above stated, that

Nothing can be for the total cultural interest which is certainly known to be unjust.

There is a range of cases, we maintain, in which the sense of justice is prior to all reckoning of social utility; and in which therefore the principle of social utility itself cannot be applied without first taking justice into account. And we would further maintain that this will always be the case hereafter, so that on all strict principles of social utility, a growing nucleus of judgments in regard to justice can be established as permanent guides for the law.

§17.

The courts are acquainted with cases in which the principle of 'no known injustice for whatever social good' has come to the test.

In the well-known case of Regina *v* Dudley, we have one of the situations which in a book of casuistry would appear a highly artificial invention confronting a sober British court. A group of shipwrecked sailors, for the evident greatest good of their greatest number, have killed and eaten one of themselves, and *have survived*, as the performance contemplated: but the Court condemns their action on the ground of the principle of common law which declares the injustice of killing any man except in self-defence, no matter for what great benefit. (Reported in 15

Cox's Criminal Cases, p. 624; 14 Queen's Bench Division, p. 273.)

When the injury is less severe, American courts, at least, have sometimes wavered. Suppose a timber lot on a mountain surrounded by private property in such a way as to prevent access to any highway. Shall the owner be prevented from bringing his timber to market because doing so would involve trespass on the unquestioned rights of owners unwilling to grant rights of way? Adjoining states, Oregon and Washington, have decided this question, through their supreme courts, in opposite senses. (Anderson *v* Smith-Powers Logging Co., 139 Pac. 736; State *ex rel* Timber Co. *v* Superior Court, 77 Wash. 585.)

In the case of a still more trifling injury, a New York court of equity declined to pronounce in favor of the plaintiff whose land, lying just up-stream from that of a power plant supplying a large community, had been diminished slightly through an error of engineering which allowed the dam to be built too high (McCann *v* Chasm Water Power Co., 211 N. Y. 301). In such a case, said the court, "equity will withhold its discreet and beneficent hand." The doctrine of "balancing of injuries" here invoked has had little favor in our courts because, I surmise, it appears to sanction a little injustice for the sake of a considerable utility. Whether it actually does so we shall shortly consider.

§18.

No accumulation of such decisions would prove the contention we are making, nor disprove it; for it is

precisely in such cases that the courts are seeking a guiding principle. But it is evident, if one runs through a series of such cases, that courts are showing a greater disposition than formerly to treat the letter of property rights with freedom, to subordinate such rights to something more fundamental, precisely as Frederick the Great did in the case of Arnold the miller, as if they were saying, "If this be injustice, make the most of it."

Now supposing that such a disposition were justified,—and I believe it is,—the theory of it can be read in two ways: either what we define as 'justice' in the literal sense is and should be subordinated to a higher good, which we may call social utility; or else the overriding of a defined right in such cases has ceased to be an 'injustice.' And the difference of these two readings is something more than a verbal difference,—a difference in the definition of the word 'injustice.' For those who adhere to the former view, holding that an injustice has been done, and ought to have been done, on account of the preponderance of social good resulting, are by implication assuming that the right of property, in the cases quoted, is an absolute right. Those who adopt the latter view are assuming that the right of property is not an absolute right; and that infringements of its customary provisions do not come under the head of actions which "can be certainly known to be unjust."

My own belief is that the courts which have decided in the cases quoted that what looks like a little injustice may be done for the sake of a considerable

good have followed instinctively the latter view. If I may venture to interpret psychologically the principle of their decisions in these cases, I should do it as follows:

The Natural Rights school has bequeathed to us a list of rights, together with a list of ways in which those rights can be infringed; and our supposition has been that as the rights are absolute, and belong to every man, so the infringements are absolute, and determine in each case an unquestionable injustice. This supposition has been embodied in our various constitutional Bills of Rights. But our belief in absolutes has been shaken in all directions. There is a presumption that all of these defined rights are subject to certain conditions about which we are not yet quite clear. But it seems to us that one of the conditions under which any man ought to hold his rights is *his own good-will* toward his fellow citizens and the public welfare. When it becomes evident to us that a man resorts to law not for preserving something that is precious to him, but for the sake of doing something for which the American vernacular now has an exact phrase,—for "holding-up" somebody or something, —we begin to judge—though the whole weight of legal tradition is against us—that a *technical injustice ceases to be an injustice*, even in the eyes of the law, because the rights at stake have ceased to be rights. What we consider is not the quantities of goods on either side; we are beginning to consider in all regions of the law, as we already do in some regions of criminal law, that the psychological motive

becomes a material condition of the nature of the act, and of the actual tenure of literally defined rights.

If there is any truth in this interpretation, we may hold to the doctrine that "no injustice is to be done" and still allow the subordination of certain technical claims of right when held with evident ill-will.

§19.

But if we thus maintain our principle, does it not appear that we hold to it at a terrible price: that of removing from the region of clear objective definition the powers and rights of any citizen before the law, and of casting judicial decisions adrift upon estimations, not of a social utility—whose ingredients at least can be described in tangible terms—but of invisible dispositions? A man is to be guaranteed his own, not because it is legally his own, but because he is what the court regards as a well-meaning man. Is not this an invitation to return to the days of arbitrary personal government?

To this objection there are two answers. First, that neither the difficulty nor the danger of applying a principle proves the principle untrue. On the contrary, the likelihood is that a principle which can be mechanically applied, and therefore easily applied, is never quite true because men are never quite mechanisms. The true principle will have life in it, and will be correspondingly hard to apply.

But, second, we must agree with the critic that the truth of a principle would not save it for legal use

unless it can be protected by further definition from abuse more serious than any good to be gained by it. I must accept the responsibility of giving a more definite and usable account of what 'justice' is to mean, if it is not to mean the recognition of a set of legally defined and invariable rights. This I shall try to do in four propositions, to follow.

VI.
PRESUMPTIVE RIGHTS

Principle I:

LEGAL RIGHTS ARE PRESUMPTIVE RIGHTS.

§20.

Law deals not with actual individuals, but with individuals artificially defined. We cannot say that law-makers are under an illusion to the effect that all men are equal. They do not even suppose them all alike in being reasonable, or in being well informed about the law, or in being morally sensitive about their own rights or the rights of others. Law-makers have probably never been blind about the conspicuous facts of human difference. Nevertheless, the law in every community—and not alone in modern communities—proposes to treat certain large groups of individuals *as if* they were alike 'before the law.' Or to put the matter negatively, it has proposed to ignore some or all of such facts as height and weight, relative intelligence within limits, physical strength, achievements, degree of wealth within limits, age within limits, sex, race, personal history, family connections. Regardless of these many things which actually make profound social differences among men, the law, especially in our own day, proposes to treat all mature persons as equally informed, responsible, and deserving of protection.

§21.

Why does the law make this presumption of equality in respect to certain fundamental rights? Is it a way of simplifying a problem which would be impossibly complex on any other assumption, in view of the large numbers of persons to be dealt with? Is it a fiction made necessary by human envy, which is always excited by distinctions, however well founded? In my judgment, it is neither the one nor the other.

In part, the presumption is a plain recognition that the disregarded differences are *irrelevant*. In any given situation involving rights and duties, most differences among men are impertinent to the issue. Whether I should pay a debt is, generally speaking, not a question with which my weight, color, or family tree has anything to do. To say that men shall be considered equal in respect to their debt-paying obligations is, so far, merely a principle of logical relevance.

Sir Henry Maine is no lover of the presumption of equality, yet he lends that principle a strong involuntary support in his approval of the movement of social advance from status to contract. For the principle of status, itself a nest of artificial presumptions, creates uniformities of class-treatment where there ought not to be uniformities, and differences of treatment where there ought not to be differences. The superiority of the principle of contract lies in its tendency to *sort out* the members of a society into diverse functions according to their fitness for those functions: and it achieves this by placing them on an equality in respect to freedom of choice. Where men

freely choose their occupations, they tend to find their right places. The presumption of equality here means the *substitution of relevant for irrelevant grounds of difference.*

§22.

As further evidence that this is the sense of the principle, note that where a difference *is* markedly relevant to a right or a duty, the law recognizes it.

Thus, it may be relevant to a question of obligation whether a person does or does not "possess the faculty of forming a judgment on his own interest."[36] Where this faculty is presumed wanting, as in minors, adjudged lunatics, and others under ward, the presumption of equality is withheld.

The present tendency in law is definitely toward the recognition of finer degrees of relevant difference in regard to rights and duties, even to the point of treating each individual on his own merits, as in fitting the punishment to the criminal rather than to the crime. Administration spontaneously tends to individualize the application of a general rule, so far as it is living rather than mechanical. Conversely, wherever individualization arises from the recognition of relevant differences, it may be regarded as the application of a rule which is perfectly general, and before which all men are equal. The runners reach the goal at different times because they run under the same conditions.

[36] Maine, *Ancient Law,* end of ch. v.

§23.

Thus far, then, we may say that the law presumes an equality among members of a community, so far as no relevant difference has yet been legally recognized among them.

But yet we only touch the surface of what is meant by saying that legal rights are presumptive. For we see the law, at times, deliberately ignoring differences which are both relevant and obvious. For example, some people are clearly more fit to live than others. And yet the law persists in holding them all as equal in their right to live. It would not be difficult to mention several circumstances which would be relevant to the amount of fitness to live. We will agree that birth and sex have nothing to do with the matter; and that infants ought not to be exposed or put to death merely because they are females or are born into poor families. But the common judgment—however it might err in applying the tests—is clear that there are degrees of moral degeneracy, or of general uselessness, or of personal suffering and burdensomeness to oneself and others, which distinctly impair fitness to live, as they impair the wish to live. Nevertheless, the law shows not the slightest tendency to qualify its presumption of the right to live. It is wholly uninterested in any tests as to whether you or I are fit to live, or how much. It refuses to authorize even ourselves to pass judgment upon our own fitness: but admonishes both us and our physicians that we are not to put an end to an existence which—for

the best of reasons and with full knowledge of the facts—we may judge ought not to be prolonged. Until we have committed an outrageous crime, the law will not falter in this presumption; and it will not condemn a murderer the less because the murdered is a shiftless or vicious citizen.

Here, the right to live seems a *presumptive* right in a sense of attributing an artificial equality in a highly deliberate manner. The reason for this seems to me extremely significant for the whole business of law-making. I shall try to state it in the second of our four propositions.

Principle II

THE PRESUMPTIONS OF THE LAW ARE CREATIVE PRESUMPTIONS: THEY ARE AIMED AT CONDITIONS TO BE BROUGHT ABOUT, AND ONLY FOR THAT REASON IGNORE CONDITIONS WHICH EXIST.

§24.

A PRESUMPTION of equality may be contrary to present fact, and yet not contrary to a desideratum. We are not as a fact all equally fit to live, equally responsible, or equally deserving of the protection of the law: but it will hardly be doubted that it would be desirable if we were.

But further, the presumption of a desired condition is, in any group of plastic minds, a force tending to bring about the thing presumed, *i.e.*, to create it. It aids a boy to reach maturity to treat him as if he were a little older than he is. A little older: for the

presumption loses its effect if it is too wide of the actual fact. The fundamental presumptions of the law are justified on this basis and to this extent: if they are too wide of the truth to be creative, they are not justified.

§25.

This is the principle which makes the presumptions of political democracy applicable to some populations and not to others. They are applicable to no population in thoroughgoing fashion. And it is still an open question whether the presumption of equality in the right to vote is too wide of the mark to be a valid presumption—whether we shall not have to re-introduce into our fundamental law a recognition of relevant differences. It is quite possible that sex-differences are irrelevant; while differences in intelligence or leisure may be highly relevant. But for the present we are presuming that the hypothesis of equal fitness to vote will bring about equal fitness to vote; just as the presumption of equal dignity among all occupations and the consequent abolition of privilege has brought about the disappearance among us of all trace of a peasant class, and an incomparable virility through the social body.

§26.

The fallacy in Aristotle's argument for slavery lay not in any misobservations in regard to human nature, but in the failure to recognize this second principle. Aristotle was quite right that some men are

born to command and some to obey; he was right in saying that some men participate in reason sufficiently to understand orders, but not sufficiently to devise orders. But what he failed to see was that law is not justified in accepting this condition as *static and permanent;* that it is false to the fundamental fact of human nature if it does so, *viz.*, the tendency of human nature to remake itself on the basis of expectation.

Aristotle had already stated the desideratum in the same treatise: the best rule, he said, is the rule over equals, not the rule over inferiors. The whole theory of law is modified when we adopt the principle that it is the business of law-making to effect desirable conditions by presuming them (as well as by other methods).

§27.

Here Rousseau had a more adequate conception than Aristotle of the function of law; and in his case the conception is particularly interesting because of its strange inconsistency with the rest of his system. The advocate of pure democracy here shows a radical distrust of the capacity of human masses to give laws to themselves, for the reason that the knowledge and wisdom to devise and accept good laws must be produced by the laws themselves:

> In order that a newly formed nation might approve sound maxims . . . it would be necessary that the effect should become the cause; that the social spirit, which should be the work of the institution should preside over

the (birth of the) institution itself, and that men should be prior to the laws what they ought to become by means of them.

Indeed, no one has stated more vigorously than this supposed apostle of the state of nature the profound change which the laws have to work in their subjects:

> He who dares undertake to give institutions to a nation ought to feel himself capable, as it were, of changing human nature; of transforming every individual who in himself is a complete and independent whole into part of a greater whole . . . of substituting a social and moral existence for the independent and physical existence which we have all received from nature. . . . The more thoroughly those natural powers are deadened and destroyed the greater and more durable are the acquired powers, the more solid and perfect also are the institutions.

But if law has to act creatively upon a plastic human material, it must know what it intends to make of it: it can find no guidance in things as they are, neither in things as they have been. It cannot passively accept what history brings forth, nor what is 'relative' to any given situation; it must choose, and define, and realize its own future; and it must do so on the basis of a valid insight into what human nature is capable of becoming. Not everyone possesses this insight,—certainly not every legislative assembly. Hence Rousseau commits himself to the paradox—paradox for a radical democrat—that "gods would be necessary to give laws to men":

> a superior intelligence would be necessary who could see all the passions of men without experiencing any of them;

who would have no affinity with our nature and yet know it thoroughly; whose happiness would not depend on us, and who would nevertheless be quite willing to interest himself in ours; and lastly, one who storing up for himself with the progress of time a far-off glory in the future, could labor in one age, and enjoy in another.[37]

It is time for us to learn from Rousseau other lessons than those which his own age took from his writings. Laws are not mere regulators of behavior; they are formers of character: they can make populations servile, and they can make them free in spirit; they can accept the brutish, idle, and ignorant aspects of the human animal and fix them with indelible dye in the masses, or they can recognize ambition and the sense of honor and fairness and fraternity and build these into the traditional qualities of a nation. And they can do these things not primarily by what they say, but still more effectively, because more silently, by what they *presume* or expect and require.

§28.

This conception of law makes clear the cleavage between a true democracy and the two falsities that lie near it, a false democracy and an equally false aristocracy. For it is a false democracy that builds on the theory that men are morally or politically equal; as it is a false aristocracy which builds on the theory that men are morally or politically unequal. In his

[37] All these citations are from chapter vii of book II of the *Social Contract*. Equally vivid comments on the creative effects of law are to be found in ch. viii, book I.

statement of fact, the aristocrat is more nearly accurate (though his case is too easy to be of any significance): but his error is in supposing that he has in that statement anything to build on. The question for the state-builder is whether it is desirable that men should *be* morally and politically equal, and should be able to look one another in the eye as brethren, each one self-respecting and responsible in his own place, and to that point every whit "as good as his neighbor." If that is desirable—and it is—then it is the business of the state-builder to *make it true*. He must give himself to the democracy of the future. He must dedicate himself to the social contract,—not the contract signed and sealed in a mythical antiquity, but the contract in which the individual and free spirits of future men will be able to join, and in joining sanction the restraints, the efforts, the dreams of all past history.

§29.

But meantime the law must rule over actual men. And its presumptions must be such as to yield results even now. The presumptions we speak of are, like the right to life, imputed to individuals, and addressed to potentialities which are even now resident in them, in the deeper strata of their natures. The complete justification for these creative presumptions must therefore be found in some facts regarding human nature, which it will be the business of our third proposition to make manifest.

VII.
NATURAL RIGHT

Principle III

PRESUMPTIVE RIGHTS ARE THE CONDITIONS UNDER WHICH INDIVIDUAL POWERS NORMALLY DEVELOP.

§30.

NOTHING is more evident, I venture to think, as a result of two or three thousand years of social philosophizing, than that society must live and thrive by way of the native impulses of individual human beings. The point upon which Aristotle's criticism of Plato's ideal communism turned was just this: that altruism itself must spring out of individual centers, and if a man is to give, he must first own; your social bond can never be stronger than the individuals who are bound, hence all social good must come by the circuitous route of first developing *them*.

Hegel's enthusiasm for the economics of Adam Smith had the same root. For Adam Smith had given the paradox of Mandeville a juster and finer expression: the prosperity of individuals becomes the prosperity of the State. This principle Hegel generalized, and stated as the foundation of the modern State. "The modern State has enormous strength and depth in that it allows the principle of (individual) subjectivity to complete itself to an independent extreme of personal particularity."[38] "It is

[38] *Philosophy of Right,* Dyde's tr., §260, p. 248.

aware that the universal purpose can make no advance without the private knowledge and will of a particularity, which must adhere to its right. The universal must be actively furthered; but on the other side, subjectivity must be wholly and vitally developed."[39]

The present moment has found another way of saying the same thing. It uses the word 'function.' Individual activity serves individual ends, but at the same time this activity, in a sound social order, performs a public 'function'; as the trader, for example, in providing his own livelihood is performing a part of the function of social nutrition. Rights, thinks Duguit, belong to an individual because and in so far as he has functions; they are the conditions under which alone functions can be performed. Or rather, it is the functions that belong to him, and the law, when it seems to be protecting a right is really protecting that function which it expects of him. If his function is one which needs property, then society will protect property in him; and to just that extent: so that if there is any property which supports no function, that property ceases to be a right.

> The individual man has no rights, nor has the collectivity rights. . . . But every individual has a certain function to perform in society, a certain task to carry out. He cannot be allowed not to perform this function, he cannot be allowed not to carry out this task, because a derangement or at least a prejudice to society would result from his refraining. . . . Everything which he does to accomplish the

[39] *Philosophy of Right,* addition, p. 249.

mission which is his because of the place he occupies in society will be socially protected and guaranteed.[40]

In this one respect the interest of the State and the interest of the individual can never fall apart: the development of the 'functions' of individuals is an integral part of the well-being of both.

§31.

But society cannot adjust rights to actual functions. This is the fundamental error of the 'functional theory.' It cannot adjust rights to actual functions; because among the functions which concern it are functions which are *not yet known* either to society or to the individuals who are to perform them.

The critical situation of the social order in respect to 'functions' is that it is dependent upon the exercise of talents whose existence can neither be compelled nor predicted by rule. Every organization must be made to work by its personnel: and its good working will depend on the quality of that personnel. You create a certain number of administrative or judicial offices; and then you look around for the executive minds and the judicial minds to fill them. You act on faith that they are to be found; but human nature in your district may not have produced a sufficient crop of the kind you require. You must put up with something less, or give up your enterprise. If, taking society in the large, every man fulfils a function; and

[40] *Les transformations générales du droit privé*, tr. by Roscoe Pound. See also R. H. Tawney, *The Acquisitive Society*.

if the function is such that, as Duguit says, "he cannot be allowed not to fulfil it," it would seem that the critical problem for any society is the problem of the crop of ability and conscience, the problem of personnel.

Now my belief is, in view of this situation, that what we mean by rights is not primarily a set of conditions which promote the performance of functions; but a set of conditions which *promote the development of powers.*

The actual fact with which society, and law, have to deal is that nobody knows the possibilities of any man, not even the man himself. Whatever personality is, it is a perpetual source of the unexpected: the unknown element is an unknown of a hopeful rather than of a hopeless complexion. We never dogmatically know when the *limit* of personal power has been reached.

But in any case, both the individual and society are dependent upon the development of an unknown and unknowable quantity. The one certain element in the situation is that in the normal development of personal powers, whatever they may be, society will be a presumptive beneficiary. And this statement has an obverse, which is that the suppression or stunting of that development will involve a presumptive, though unmeasurable, loss to both society and the individual.

In this certainty, and this uncertainty, we have the basis of the entire presumptive structure of 'right.' *It is objectively 'right' that an individual should de-*

velop his powers, whatever they are. This objective right is the true standard for legal right. Legal 'rights' are, or should be, conditions under which individual powers may be presumed to develop best. The functions which those powers may fit into must be taken on trust, or, if you prefer, on the statistics of probability. An infant has rights long before it has functions, and independent of any question of function. Whatever the conditions are under which human powers naturally develop, those conditions will be presumptive rights.

If most powers develop best in liberty,—as they do,—liberty will be a presumptive right. Unless we know that in some individual case powers develop better in servitude, we must presume the right of personal liberty. In the case of an Epictetus or an Æsop, if tradition is to be credited, personal powers developed nobly in slavery: they might conceivably have developed less well under any less trying discipline. If that was the case, slavery was right for Epictetus and for Æsop. But whether that was the case you and I do not know; nor any other human head or committee of heads: whether that is ever the case, for any given individual, God alone knows. The conditions of our ignorance then will not permit us to assume, will never permit us to assume, that human powers develop as well in servitude as in freedom: the presumption will always be on the other side. Hence, subject to contrary proof in individual cases, personal liberty will always be a 'right'; and slavery will never be right. Rights, we say, are the

conditions under which we must presume that human powers will best come to their own.

§32.

It is because this degree of ignorance and of certainty is fairly uniform for all men that we can mechanize so large a part of the system of right.

And if we have here the true reason for a right, we have at the same time the reason for any suspension thereof. For we may be as well informed of some conditions under which powers do *not* develop. If it should appear, for instance, that ill-will is a condition under which human powers do not come to their own, or find their right grooves, the ascertainment of ill-will would carry with it the removal of the presumption of right. Or, to put the matter conversely: good-will would be a condition of every presumption of right. *Without good-will, no man has any presumptive right*, except the right to an opportunity to change his will, so long as there is hope of it.

In proportion as the proof of ill-will is difficult, the admission of any such principle into law would fail to disturb the mechanism of presumption. There need be no foreboding that so subjective a criterion would bring confusion into administration of law: the danger would be that, precisely because it is subjective, it will not introduce the degree of irregularity which justice would demand.

Society in the granting of rights must take two risks: 1, the risk that it will thus bring out the powers of individuals; 2, the risk that the powers

brought out will be used for its service. These risks are unavoidable and make impossible the whole effort of discovering rights by calculating social value.

Principle IV

THERE IS ONE NATURAL RIGHT AND ONE ONLY.

§33.

If the different presumptive rights are so many ways of promoting the development of individual human powers; if any law is right because it does this promoting, and only so far as it does it, ceasing to be right when and in so far as it fails of this achievement; then this measure or standard by which we test what is 'right' or 'just' gives us the nature of 'rightness' or 'justice.' It defines what we may please to call the absolute right, which is nothing more than to say, it defines what right is.

It is right, or absolutely right, that an individual should develop the powers that are in him. He may be said to have a 'natural right' to become what he is capable of becoming. This is his only natural right. He has no natural or absolute right to liberty, nor to the pursuit of happiness (unless this means the development of his powers), nor to life itself, unless human life can be shown to be an indispensable condition to such becoming,—which would be difficult. And even this right to self-development is absolute only in the sense that it is permanent and inalienable by any outside agency; it is not absolute in the sense that it is unconditional. An individual can suspend,

and perhaps ultimately destroy his own right, by his own free choice not to become what he is capable of becoming. It is not the free will as such that is the subject of the inalienable right: it is the will to be oneself that is the subject. Wherever moral ambition exists, there right exists.

And moral ambition itself must be presumed present in subconsciousness, even when the conscious self seems to reject it, so long as society has resources for bringing it into action; in much the same way that the life-saver presumes life to exist in the drowned man until he has exhausted his resources for recovering respiration.

§34.

It may seem that here we have strayed into a region into which the theory of law cannot follow us. But this is only apparently the case. It is true, as we have said, that law can deal only with presumptive rights; it can administer only such presumptive rights as have been defined in terms of tangible criteria: but if definitions change from time to time, and if between all existing definitions there remains the legal reference to undefined standards, it is as necessary for the law as for the moralist to know the source of definitions. And the lawyer must naturally leave the advantages of finished law and accept the perhaps uncomfortable situation of every human knower when it comes to ultimate things: that these things, being living and intangible, must be approached by intui-

tion,—as we saw that in the last resort Kohler and Stammler found themselves forced to do.

§35.

The standard we have now reached has a certain affinity with that of Stammler and of Saleilles and of the others of the present Natural Rights school in France. It resembles them in being a standard of justice: and in setting up the principle of "No injustice" as a rule for law-making and law-administering, in contrast to the view of Kohler and the neo-Hegelians.

But it is also different from all of these. It finds its standard not in a pure form without content, not in a relation of 'pure community' between men in general; but in the character of the individual human will, the concrete good which that will seeks, and the claim which that seeking (which we have described as 'moral ambition') makes upon every agent that can affect it, whether that agent be another individual or the organized community as maker of laws.

The error of the school of Stammler lies in the supposition that a pure form can justify anything. The only thing that can justify any act or regulation whatever is a *good:* the only thing that can set aside a law as wrong is a better law or the idea of a better law. And the only thing that can give a law the quality of better or worse is the concrete result which it promotes or fails to promote. So far, the thought of von Ihering must lie at the basis of all future philosophy of law.

Stammler is unquestionably right in saying that no particular end can have an obligatory force over any other will than that of the individual who cherishes it. But the inference from this truth is not that all content must be eliminated from the standard. The inference is that *the standard must contain a content which is good for all wills.* Pure community is a matter of no interest to any will; but a community which pursues a common good is of supreme interest to all wills; and what we have here said is that whatever the nature of that common good (and Kohler's word Kultur certainly describes much of it) it must contain the development of individual powers, as a prior condition for all other goods. Art and science and the mastery of nature through technique are parts of the common good: but for Kohler they seem to float off from individual enjoyers or makers of art, knowers of science, users of technique. What we here point out is that, apart from these knowers and users, these several ingredients of Culture have no existence.

It is true, a transmitted Culture is the chief resource for developing human powers, for e-ducation: individuals cannot grow much farther than the inherited spiritual wealth of their society permits. On the other hand, Culture is dependent for its growth and for its very existence on being *appreciated* by the developed faculties of individuals. Hence the growth of these faculties becomes the primary concern of right.

§36.

The attempt to regulate law by a pure form has more than a negative disadvantage. It has a positive danger. For it cannot avoid the assumption that the clash of wills is itself an evil, and the harmony of wills is itself a good. It inclines to adjudicate a clash as a clash, and not as an issue of concrete judgments. It inclines to assume that the mere fact of conflict of particular ends proves both particulars wrong. In practice this is far from being the case: and it is seldom indeed that in any clash one will is not more nearly right than another. The word 'harmony' in such case settles nothing, though it names the form of the desired result. What we must have, and what the law must aid in reaching, is harmony *on the right judgment of the issue*. We do not want harmony on any other terms; nor can we get it. Harmony, therefore, can be only a secondary guide.

§37.

But our standard differs in another respect from the standards of these writers, and, indeed, we think from any standard which has been previously suggested: namely, in making intelligible the differences in weight or importance which we do, in fact, attribute to our various rights.

The main error of the older natural rights school was not that it had an absolute right, but that it had too many absolute rights. Each right on the list stood fixed and unyielding; each supreme, like a sovereign

power, independent of all the rest. With such a nest of absolutes there could be no living. There must be compromise, and as any compromise destroys the claim to absoluteness, the natural outcome of experience was the repudiation of all of them. And now the name of 'natural right' can only creep into sight with the reassuring placard, "changing content guaranteed."

The apology is unnecessary. Anybody who has any standard at all has an absolute standard, whether he so labels it or not. We have no fear of that logic. We will make progress when we get rid of the awe of names, and the shams of academic fashion and fear, which are among the worst. An absolute and a standard are convertible terms.

But a true standard will do the work of a standard. It will explain what we mean by the rights we have, as well as guide us to the rights we as yet have not. It will explain them by subordinating them, *i.e.*, showing how they are derived from the standard. And in subordinating them, first to itself and then to one another, it will make clear what degree of stress is to be put on each,—what is central and important, and what is peripheral and relatively unimportant. It will introduce a rough *quantitativeness* into the theory of law. And we believe that this is one of the things the law stands in need of.

For while in one way every law is a law, and the majesty of the law is in it; and every offence is disobedience, so that he "who offends in one point is guilty of all"; still, the distinction of venial and

mortal sin makes its way into the perspective of the law-giver and of the judge. The psychology of the subject of law and right cannot be kept out of the great structure of the law. Let us note some of its consequences.

§38.

Westermarck has derived the moral sense, in its historical origins, from the human disposition to 'disinterested resentment,'—*i.e.*, the resentment of a bystander who with nothing at stake in a quarrel exerts himself against what offends his sympathy. Adam Smith had a similar view of the origin of conscience.

But resentment is a matter of degree. And if we were defining a wrong psychologically as 'that which we disinterestedly resent,' we should be able to set up something like a scale of wrong,—say from a careless misuse of borrowed property to the bloody cruelties of a worthless bully.

Is there any explanation for the degree of resentment, as it shows itself in the mental experiments any of us can make upon himself by rehearsing in imagination a list of different types of wrong, or as it shows itself in the actual struggles against resented wrong which history spreads out for us? Are we at the mercy of the facts of animal heredity here? Do we resent most the forms of unsocial behavior which were most unsuited to the survival of our remotely ancestral animal societies? Or is there a more intelligent relation between human resentment and the welfare of future human society?

§39.

History seems to me to speak clearly on the subject. The momentary heat of anger has its animal roots; we still instinctively resent a physical outrage more than a politely studied and decently executed crime of national dimensions. But the resentments that sustain wars and revolutions are of a different fiber. The human being has a deeper hatred of hypocrisy and polite exploitation than he has of thuggism; and this hatred is not inherited from the apes. And the human being fights hardest and longest for things of which the Neanderthal brain never dreamed.

This new proportionality of resentment has its explanation in the growth of self-consciousness; and in the increasing disposition to protect what the human mind dimly perceives in itself as its *growing regions*. It has come to resent injury to the soil more than injury to the crop, mentally speaking. Conscience and worship are the circumstances which surround the growing regions of personality, the budding points for those new ideas by which both the individual and society must live. To have become sensitive about these things means that the human individual has become aware of the prime importance of his right to become what he is capable of becoming, and to proportion his other rights by that standard.

What is generative is not always more important than what is generated: there have been times in human history when a crop was worth far more than

a field, or a stag more than all the bows and arrows. But as the race "climbs out of the cock-pit," values are reversed; and humanity begins to treasure and protect what is generative, and to resent first of all whatever threatens that.

This is the permanent significance of the profound influence which religion has exercised, historically, on law-making. The removal of organized religion from direct effect on law does not destroy the psychological factors for which it has stood. If the crimes of infanticide, procuring abortion, suicide, seemed peculiarly sinister to the older religious spirit, because the 'soul' was involved; if the Puritanic scale of values found its way into all corners of its scheme of government; the probability is that the general intuition of relative importance remains valid however we revise the sometimes fantastic particular judgments made under it. We still find the 'right to life' relatively 'sacred' as compared with the right of property; and freedom for honest religious expression is still held more vital than freedom of association.

The scale of values among rights is to be determined by the closeness of their bearing on the development of mental power in individuals.

§40.

It would be futile for philosophy to offer a formula for the guidance of law without some such scale of quantitative measure.

Just as Stammler's principle of Community is unusable or misleading, if it remains in the region of pure form, so any attempt to guide law by the assembling of interests involved will be misleading unless there is a way of *weighting* those interests.

If the life of a newborn babe is at stake, say of an imperfect babe,—what are the interests involved? The interest of maternal affection,—now a sadly distracted interest? The 'social interest in the individual life,'—now inclining to the judgment, Thumbs down? Those interests, in fact, have *suddenly become uncertain and incalculable*, because the thing on which they depend has become uncertain. They will begin to value that life quickly enough if it can appear that that life will value itself, as a human life, and will attain a state which we have described as 'moral ambition.' This is what religion has been interested in when it has inquired whether there is a 'soul' there. And organized religion has certainly wavered in its answer to the question, as any human judgment well may waver: but it has not wavered in its instinct for *what the question is.*

In brief, the formula, 'adjustment of all relevant interests' is as inconclusive as the formula 'harmony,' unless we have a basis for understanding why some types of interest have been ascribed so profound an importance as compared with others. The working out of the scale of importance is a matter of *working out the system of human instincts within what we call 'the will,'* a matter to which the writer has given

some attention elsewhere.[41] For the present purpose, what we wish to note is that our standard provides the place for such measurement.

We shall now enquire whether we can bring our general principle of right into closer relation to the work of jurist and law-maker.

[41] *Human Nature and Its Remaking.*

VIII.
SPECIFIC GUIDES FOR LAW-MAKERS

§41.

It is the business of the philosopher to connect law with its permanent roots in the nature of things, not to enter the field of specific legal construction. That must be the work of the jurist; and the law is indeed fortunate when, as in the case of Kohler or Stammler, Holmes or Pound, the jurist and the philosopher are one. The less gifted mind must be content to remain on the scene until he is sure that the liason between his field and that of his neighbor has been effected.

We have established a general standard for law in the natural right of the individual to become what he is capable of becoming. Like all very general principles, it is less usable as it stands than the more particular principles which lie nearer to specific legal questions. But these more particular principles of right, we have said, are merely 'presumptive'; they are subject to change if the presumption changes. They gain in applicability at the cost of relativity.

But there are, I believe, some of the conditions for individual human development which we have reason to regard as permanent, for the same reason that some propositions of psychology are true for all men in all times. If we could succeed in stating a group of such permanent conditions, we should have something like a code of natural justice, and a comparatively usable set of subordinate standards for law.

Now there will naturally be two sets of conditions to be considered, in thinking how a human being reaches his best development,—the conditions of his own person and activity, and the conditions of his environment. Let us enquire whether we can find some permanent conditions in each of these two sets.

§42.

The human being may be described as a set of ideas striving for control over a physical body and its neighborhood. When we say the individual develops, we mean that these ideas become clearer and stronger, and more effective in their mastery. Now it lies in the nature of an idea that nothing can develop it except *use by the person who has it.* Any one who is obliged to do what someone else thinks is simply not using his own ideas, and so far he is not growing. This gives us one permanent condition of growth; and this will be our definition of the right of *liberty*, the right to use one's own ideas in governing one's undertakings.

Now these undertakings might be considered as falling in three directions,—the control of one's self and one's living, the control of others, and the control of the physical world. These will show us several permanent aspects of the right of liberty.

(a) It will always be true that one must reach his due growth by using his ideas in managing his own body, in making his own choices of occupation, residence, companions, in working out his own practises

in manners and morals, and in so doing making his own experiments and mistakes (within bounds determined by his other rights), and in referring his life to his own conscience, confirmed by his own mode of worship,—since worship may be described as the cultivation of the growing point of human nature. The right to this use of ideas (commonly described as the rights of personal liberty, freedom of worship, etc.) we may describe as the *right of liberty in self-management.*

(b) It will always be true that one must reach his due growth by using his ideas in the effort to persuade his fellow men. It is a necessary part of the life of an idea to find a lodgement in the heads of others than the one who thinks it. He is driven by his instinct for self-propagation (as well as by various utilities) to come to his own by speaking with them, by agitating for his views, by forming associations, cults, parties, by establishing experimental societies. The most persistent and radical of these experimental societies is called the family: here two individuals undertake a common ordering of life under the control of diverse ideas which emanating from a twofold source struggle toward consistency.

The right to this use of ideas (indicated commonly as the right of free speech, of free association, the various domestic rights) we may describe as the *right of liberty in seeking social control.*

(c) It will always be true that one must reach his due growth by using his ideas in the control of mate-

rial objects. To a certain extent, this is implied in (a) and (b); for the control of self and the control of others are largely occupied with the management of physical objects. As one cannot reach maturity without food, so one cannot be a complete self without some control of physical nature.

This is the positive ingredient in that composite right we commonly refer to as the right of property. It is usually referred to our interest in the use of things and their enjoyment. This interest is in the foreground in our psychological attitude toward property. But the permanent element in the right hails from the deeper interest in the use of things as necessary conditions of personal development. We describe this right as the *right of liberty in the control of nature.*

Since all of these three aspects of liberty are necessary conditions of growth, no one can be said to be more important than the others. But when all are present in some degree, the first as the most intimate, is to be given the greatest weight; and then the others in the order named.

Let us now turn to the second set of conditions of personal growth, namely the conditions of the environment.

§43.

Fear and risk are among the conditions of which we may be justified in predicting the future.

A certain amount of fear and risk belong to the spice of life. William James chooses his pragmatic

philosophy largely on the ground that it is not burdened by the appalling safeness he seems to observe in absolute idealism. Graham Wallas speaks of the love of fear as a fundamental motive in social psychology. But Kohler sees that reason has some work to do in limiting the region of chance, and commits himself to the proposition that Culture is always a realm of reason in this sense, that accident, meaningless accident, is held down to a minimum.

The person who loves risk will be found to be an epicure in regard to its kind and amount. He may risk his life to find the North Pole if he is sure there is a North Pole, that the methods of travel give him a fair chance of reaching it, and that there is a society of geographically-minded human beings to whom the adventure, if successful, has an unquestionable value. Nobody loves the risk that has no meaning and no certainties at its flanks. Against the meaningless types of risk—fire, disease, storm, war—men and nations would insure themselves if they could; and even the polar explorer or the modern infantryman carries a life policy. In this respect the bluffest of pragmatists is at one with Kohler and Hegel.

The unbanished risks of life are probably great enough at all times to satisfy the average taste for adventure. But, in any case, it will be agreed that mankind will have no wish to return to the conditions in which large outlays of individual time and energy are necessary to safeguard life and property

from predation. To be emancipated from these fears, and these waste actions, may be reasonably taken as a permanent condition for the development of higher human powers.

But this is tantamount to saying that the security of the person and of such property as belongs to the normal growth and exercise of his powers are now and always will be presumptive rights.

§44.

There is still another type of risk which belongs to the permanently unprofitable class. That is the risk which comes from the unreliability of the human wills with which one is dealing.

No doubt one must achieve his own character by meeting all sorts and conditions of men, and must learn the shrewd judgment of men by experience of much human fallibility. But if irregularity were the rule, and if good faith were too rare to support an expectation, there would be no interest in achieving this wisdom, and the formation of personal habits would be a disadvantage in the contests of deception.

Human powers can only reach their normal development if within their human environment there is a region of dependableness comparable with the regularity of physical nature: and that is to say that the right to form expectations based on the promises of fellow men and to depend on their fulfilment is now and always will be a presumptive right.

§45.

We thus specify a *right to security* which, together with the right of liberty above described, we believe to be valid for every future society. It may be, like the right of liberty, detailed in its applications: we may thus speak of the right to the security of one's person, the right to the security of one's agreements or contracts, and the right to the security of property.

The scheme of these permanent presumptions of right we may set out as follows:

The right of liberty:

(a) in self-management;
(b) in seeking control of others;
(c) in control of nature;

The right to security:

(a) of one's person;
(b) of one's agreements or contracts;
(c) of one's property.

But these are hardly yet sufficiently defined for the specific purposes of law.

The right to personal security, for example, will need to be defined in terms of the kind of infringement to which, in view of human nature, it will be most persistently exposed. In our own society intentional aggression is but a small part of the risk to which an individual is exposed. One is more likely to be injured through negligence of his neighbors, or through indirect results of their actions, or through

their failure to control their own possessions capable of doing damage to me and mine. A man, for the purposes of the law and of my own security, is much more than his body: a man is his body, plus his actions, plus the results of his actions, plus his possessions, and plus the results of these possessions. And society could not well persist unless the reason, standing in the center of this complex system, could control the whole.

My right of security, then, must be defined in terms of this human system; and my right is that I may be able to assume that *the reason which is in nominal control will in fact control it*, and so control it as to avoid injury to the corresponding system which is identified with my name.

The growth of these systems in complexity is proportionate to the growth of personal powers, and of the reason which administers them. In so far as the law successfully promotes the development of individual powers, its own labors will be multiplied; and its specific provisions will accordingly vary. Only the right to security itself will not vary. Here the historically variable and the permanent seem to have their meeting place.

§46.

If now we should turn to the common law as we find it in the Anglo-American practice of today, and should endeavor to extract from it the most general principles which it expresses, we ought to find that these principles meet the scheme of presumptive

rights which we have deduced, just at this juncture between the permanent and the historical.

This is the task of the philosophical jurist; and this task has already been well begun.

In an *Introduction to American Law*,[42] Dean Roscoe Pound has proposed five "Jural Postulates," which he regards as expressing the characteristic ideals of this civilization, rather than principles valid for all places and all times. But as I state these postulates, the reader may judge whether the work of extracting the principles has not been so thoroughly done that in these postulates the relative does in fact join hands with the permanent:

Jural Postulate I

In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

Jural Postulate II

In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

Jural Postulate III

In civilized society men must be able to assume that

[42] Dunster House Bookshop, Cambridge, 1919.

those with whom they deal in the general intercourse of society will act in good faith, and hence

(a) will make good reasonable expectations which their promises or other conduct reasonably create;

(b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;

(c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation, whereby they receive what they could not reasonably have expected to receive under the actual circumstances.

Jural Postulate IV

In civilized society men must be able to assume that others, when they act affirmatively, will do so with due care with respect to consequences that may reasonably be anticipated.

Jural Postulate V

In civilized society men must be able to assume that others who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds.

In the detail of the second postulate, as of the third and fifth, there are specifications which may well be taken as stating the ideals of *this* civilization. But it will be evident to the reader that it is only in respect to this detail that the five postulates of Dean Pound differ from the three presumptive rights of security

stated in §45 above. They could in fact be regarded as derived from those three rights; and it will probably be no secret to the judicious reader that my own discussion in §§43-45 was governed to no small degree by the circumstance that these jural postulates were in existence.

The reader, then, must judge whether the liaison between philosophy and the science of law has been established. To my mind, the connection may be regarded as accomplished, at least so far as concerns the right of security.

§47.

I DO not mean to say that this is the only point of contact between law and philosophy; nor that these presumptive rights are the only philosophical guide for law-making.

What we have maintained is that where injustice can be known, the rule of No injustice must take precedence of all other rules. But there remains the wide range of cases in which what is just guides itself upon what is socially expedient, in virtue of the principle stated in §16 that nothing which is certainly known to be disadvantageous to social welfare can be just. Our canons affect this field only in so far as they point out what is the one fixed point in the right of the individual which no state or society can possibly be benefited by attacking; and then by showing how the various presumptive rights shade off quantitatively in importance, until, in specific cases, the very demand of the individual's absolute right might

be to yield the minor right to the welfare of the community.

This is the field for the great positive work of Kohler and of the sociological school of today.

§48.

The relation between these two aspects of the philosophy of law would be difficult to determine if it were not for the peculiarity of what we have so far called the 'powers' of the individual.

But the 'powers' of a human person are all phases of one power, as we have tried to show in another connection. And this one power, in civilized society, expresses itself in a form which is not competitive; which is, on the contrary, at its maximum when it most contributes to the powers of others. *Power through ideas* is the specifically human power, and power through ideas can be had only on condition of making those ideas the property and servants of the community and the race. Hence the individual cannot come to his own unless the community is there, or unless the mental life which it embodies is continuous and competent to conserve what is committed to it. The individual can never serve himself, not even his spiritual self, at the expense of the historical life of the State.

But there is a wide gap between the *existence* of the State and its '*prosperity*.' Man cannot maintain his absolute right to become what he is capable of becoming unless he is ready to sacrifice himself and all

his presumptive rights to the existence of the State. But if he resigns a justice, which is never his private perquisite, to the prosperity of the State, its comfort, its possessions, even its good order, he makes the sacrifice of integrity,—his integrity and the State's, —which is the essence of social abomination and the beginning of social death.

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